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Current Topics.

There is published in this issue of the Albany Law Journal a recent opinion of the Supreme Court of the United States in a case of unusual interest and some importance in our new insular possessions. The point involved was substantially this: When the the United States District Court for the District of Porto Rico was created and the judge appointed to administer it reached the island, he found in force a system of jurisprudence with which he was not familiar. Moreover, he was not able to speak or read the Spanish language. He saw no other course open to him therefore than to adopt bodily in his court not only the common law system of pleadings but the common law actions and remedies. In this he was of course encouraged by the American lawyers who had flocked to the island as a new field of practice. One result was that the native bar being accustomed to a system of written laws and wholly unfamiliar with the unwritten common law, which was accessible to them only in law books in a language which they did not understand, were unable to practice and represent their own people in that court. The course adopted by the Federal judge was perhaps the only practical course open to him under the circumstances; but it was not in harmony with the general laws relating to the Federal Courts and promptly became a legitimate cause of complaint. In time it also worked hardships and brought about a confusion which naturally followed the enforcement of two distinct systems of law. In this decision, the Supreme Court has set the Federal Court of Porto Rico on its true course. The Attorney-General of Porto Rico at that time was the Hon. James S. Harlan, of Chicago, who denied the right of the Federal Court to issue a writ of garnishment against the disbursing officer of his department as a means of reaching the salary of an employe, on the ground that such a writ was unknown to the local laws, although the same result could be accomplished in other ways. The final result is a vindication of the position taken by him at that time in relation to the matter, and no doubt a wise and just means of settlement of a troublesome controversy.

State Senator Will G. Graves, of Spokane, Washington, recently defied the Supreme Court of that State, and declared to the Court that while the charges he had made against the tribunal were harsh, he believed "the conclusions were justified by the facts," and in effect told the Court that unless it decided the case the way he contends for the Court should punish him severely for his criticisms. Members of the Court sat in astonishment as he made his charge. They have now taken under advisement the case which called for this unexpected charge. Recently, both the Supreme Court and Superior Courts of Washington have taken upon themselves great liberty in reducing damage suit verdicts. In the case of Williams against the Great Northern Railroad, the Supreme Court reduced the verdict from $33,000 to $20,000. Mr. Graves contended that the railroad made no plea that the judgment was excessive, but went to the Supreme Court merely on points of law, and that the higher tribunal on its own motion made the reduction.

In speaking of the action of the Supreme Court, Mr. Graves stood before that body and accused its members of "undoubted transgressions of the statute law," "an unwarrantable assumption of power," and "unques-

tioned transgression of every principle of law or reason." Again he says, "By what process has the Court advised itself of the conditions of the minds of the jury? Do omniscience and omnipotence here run hand in hand? Is it essential to the due discharge of its sworn duty that the Court play Richelieu to defendant as Julie de Mortemar?" Mr. Graves said he was stunned and confounded by the decision, and asked, "Whence comes this sudden access of power?" A very proper question, if Mr. Graves is right on his facts. A courageous attorney seems to have been needed and it looks as though Mr. Graves has risen to the emergency. The answer of the Supreme Court to his strictures will be awaited with interest not alone in Washington, but throughout the length and breadth of the land.

According to a recent decision of the New York Supreme Court, Appellate Division, First Department, a theater proprietor has the right to refuse admission to any person and cannot be compelled to sell him a ticket. The decision was in the case of Charles Burnham against the Theatrical Managers' Association, the plaintiff's claim being that it was the right of any person to go to a theater and demand admission on the payment of the stipulated amount, any objections of the management to the contrary notwithstanding. Mr. Justice Houghton, who wrote the opinion in the case, held that "the manager of a theater has a right to say who shall enter his place of amusement and who shall not. This follows that his enterprise is a private and not a public one. The defendant and his associates did not therefore enter into an unlawful agreement when they agreed that the complainant should not be admitted to the various theaters managed by them." The Court, in effect, seems to hold that a man's theater is the same as his home, and that he has the right to arbitrarily refuse admission thereto to any person whom he regards as objectionable for any reason. This is certainly a sweeping decision, and its effect, if followed by the highest court, will be watched with not a little interest. It would seem to follow that even the color line could be drawn and negroes excluded from public places of amusement frequented by whites. This would seem to be clearly unconstitutional. Besides, it is hard to see how a public place of amusement can be classified with one's private house. It does not seem probable to us that the Court of Appeals will affirm this decision. Theaters, while owned by private individuals in many cases, are at least quasi-public places, and manifestly, different rules should be applied to their management than in the case of wholly private places. It would seem to be the right of any respectable and generally unobjectionable person to demand admission on payment of the stipulated sum.

In the death of the Hon. George C. Barrett, Justice of the Supreme Court, the bench loses one of its oldest members. For more than thirty-four years he had served as a member of the Supreme Court with a zeal, ability and distinction that made him justly rank as one of the leading jurists of the Empire State. He was one of the original members of the Appellate Division, First Department, from which he retired only a few months ago, on account of failing health, although he had been re-elected for another full term of fourteen years. Justice Barrett was born in Ireland sixty-eight years ago, the son of the Rev. Gilbert Carter Barrett, who became a missionary and labored among the Indians of Canada. While his parents lived in Canada, young Barrett attended school in London, and later came to New York, where he attended Columbia College. He remained at Columbia only one year, leaving that institution to take up his legal studies. He succeeded in working his way through law school by literary work and in due time was admitted to practice. He soon acquired business, and at the age of twenty-five was elected Justice of the Sixth Judicial Court of New York. Later he was elected a judge of the Court of Common Pleas to fill a vacancy. He served in this court with Charles P. Daly and John

R. Brady, and at the expiration of his two years' term again took up practice. Mr. Barrett's peculiar fitness for the bench was again recognized by his political associates and personal friends and on October 19, 1871, he was nominated by the Apollo Hall Democrats to succeed Josiah Sullivan as a Justice of the Supreme Court. The nomination was endorsed by the Committee of Seventy, both wings of the Republican party and the Municipal Council of Reform, and Mr. Barrett was elected by over 40,000 majority. Thus, at the age of thirty-four years he took his seat on the Supreme Court bench. His judicial associates at that time were Daniel P. Ingraham, Albert Cardozo and John R. Brady. The useful service which he rendered is best attested by the large number of opinions written by him. These show a depth of research, power of reasoning, clearness of expression, and ability to deal with great and important subjects, which have rarely been equaled. In addition to this, those who were daily associated with Justice Barrett are unanimous in testifying to his uniform kindliness, equable temper and genial qualities, even under stress, which endeared him to all. The close of such a career, while to be sincerely regretted, is fruitful of lessons to the younger generations of lawyers.

The Massachusetts Supreme Judicial Court has dealt the monopolies a severe blow in the recent decision to the effect that no person, firm, corporation or association of persons doing business within the State may make a condition of sales that the purchaser shall not handle the goods of other dealers; in other words, that the seller or manufacturer must not bring pressure to bear upon the dealer in order to make the former's monopoly more complete. The decision was handed down in affirming a verdict secured by District-Attorney French, of Norfolk County, against one Straus, an agent of the Continental Tobacco Company. Straus was convicted of selling tobacco to retail dealers of Bridgewater and Brockton at a reduction, on condition that they should not handle the goods of competitors of the Continental. This decision is in effect serving notice on the combinations which have monopolistic leanings that they cannot crush out weak competitors in any such manner as has been hitherto practiced. Hereafter, any man who feels aggrieved at the Trust tactics, instead of going to the legislature for relief should put his evidence into the hands of the district-attorney, as a basis for an indictment by the grand jury. It would seem to be wise for the other States that have not already done so to enact similar statutes, and by the imposition of heavy penalties check one of the most mischievous practices of the great corporations which seek to stifle all competition.

The indefinable influence of women on the intellects of jurymen seems to have given rise to the prevalent idea that it is difficult if not impossible to successfully prosecute a woman for a crime, a feeling which expresses itself in the general statements to the effect that as things now stand a woman may commit almost any number of murders with impunity. Mr. Arthur C. Train, in the *Saturday Evening Post,* takes a contrary view, alleging that the same sentiment aroused by a woman supposed to have been wronged is not inspired in a jury by a woman accused of crime. While not denying that juries are apt to be more lenient with women than with men, Mr. Train says that this leniency shows itself not in acquitting them of the crime charges against them but in finding them guilty in lower degree. The ratio of women to men indicted and tried for crimes, he says, is about one to ten, and although no woman has suffered the death penalty in New York in twenty years, the average number of convictions for crime is practically the same for women as for men in proportion to the number indicted. Since the year 1887, sixteen women have been tried before juries for murder in this State, of whom none was convicted in the first degree, three were convicted in the second degree, three of manslaughter in the first degree, five of manslaughter in the second

degree, four acquitted, and in one the jury disagreed. Mr. Train shows by statistics that the percentage of convictions to acquittals of women defendants averages eighteen per cent. greater than the percentage for both sexes. He believes that a more elaborate table would show that where the defendants are men there are a greater proportionate number of acquittals, but more verdicts in a higher degree. A verdict of manslaughter in the second degree in the case of a man charged with murder is infrequent, but convictions of murder in the second degree are exceedingly common. The writer concludes that the reason for the higher percentage of convictions of women is that fewer women who commit crime are prosecuted than men; that they are rarely indicted unless they are actually guilty of the degree of crime charged against them, while practically every man who is charged with homicide and who it seems may be found guilty is indicted for murder in the first degree.

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Negotiable Instruments Law.

DEMAND NOTE BEARING INTEREST—ACCOMMODATION INDORSER—PRESENTMENT FOR PAYMENT WITHIN REASONABLE TIME REQUIRED.

N. Y. COURT OF APPEALS.
Decided May 15, 1906.

COMMERCIAL NATIONAL BANK OF SYRACUSE, appellant, v, MARTHA E. ZIMMERMAN, as administratrix, &c., impleaded, respondent.

The plaintiff brought this action to foreclose a lien on certain bonds of a railroad company which it had held as collateral security for the payment of a note of the defendant, the Syracuse Construction Co., indorsed by Joseph Zimmerman, and to recover a judgment for an deficiency arising upon the sale of the bonds against Zimmerman's estate. The note read as follows:

"$10,000. SYRACUSE, N. Y.,
" Sept. 16, 1899.

"On demand after date we promise to pay to the order of Joseph Zimmerman ten thousand dollars at Commercial Bank. Value received with interest.

" SYRACUSE CONSTRUCTION CO.,
Per J. S. Kaufman, Treas."

Upon the trial of the issue, which was had without a jury, the trial judge found, as the facts of the case, that the note was indorsed by Zimmerman without consideration and for the accommodation of the maker; that on September 20, 1899, the plaintiff discounted the note for the maker, the defendant construction company, receiving the bonds of the railroad company as collateral security for its payment; that in January, 1903, Zimmerman died intestate and his widow, this defendant, was appointed his administratrix; that on April 9, 1903, the note was presented to the maker for payment and, payment being refused, was duly protested for non-payment; that "said note was not presented within a reasonable time after it was issued and that said plaintiff did not demand the payment thereof, or give notice of the dishonor thereof, within a reasonable time." Upon these facts, he reached the legal conclusion that the plaintiff was entitled to enforce a lien upon the bonds by the sale thereof; but that as the "presentment of said note was not made within a reasonable time after the discount," the indorser, Zimmerman, and his estate were released from all liability thereon. Upon the plaintiff's appeal from so much of the judgment thereupon entered as adjudged that it was not entitled to judgment against the estate of the indorser for the deficiency upon a sale of the bonds; the Appellate Division, in the Fourth Department, by a unanimous vote, affirmed the judgment as rendered. The plaintiff now appeals to this court.

Edwin Nottingham, for appellant; Geo. W. O'Brien for respondent.

GRAY, J.—The only question of importance which this appeal presents is of the correctness of the decision that the presentment of the note for payment had not been made by the plaintiff within a reasonable time. That must, necessarily, turn upon the effect of the enactment of the provisions of the Negotiable Instruments Law of 1897 (Laws of 1897, chap. 612). Section 131 of that law provides that, where the instrument "is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof." By section 4 it provided that "in determining what is a 'reasonable time,' or an 'unreasonable time,' regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the fact of the particular case." Prior to his legislative enactment, the decision of this court in Merritt v. Todd (23 N. Y., 28) was regarded as having settled the rule of law applicable to the determination of such cases. In that case the note was payable on demand, with interest, and the question arose as to the continuance of the indorser's liability, where three years had intervened between the making and presentment for payment. Chief Judge Comstock, with the concurrence of the majority of the judges, undertook to resolve what he regarded

as the existing uncertainty as to the rule, which conflicting decisions had brought about, by referring the interpretation of the contract to the adoption of one of two principles. By the one principle, a promissory note, payable on demand, with interest and indorsed, is to be regarded as a continuing security and no dishonor attaches until payment is required and refused. By the other, or opposing, rule the holder, if he wishes to charge the indorser, must make his demand of the maker without delay. Judge Comstock finds no intermediate ground to stand upon and holds "that questions of this kind ought to be determined according to one of the two rules which have been mentioned; in other words, that the demand may be made in due season at any time so as to charge the indorser, or else that he is discharged unless it be made with due diligence, in the general sense of the commercial law. Between these alternatives we are to select the one which will best harmonize with the language of the contract and the intention of the parties. A demand note may be payable with or without interest. If the security be not on interest, it may be a fair exposition of the contract to hold that no time of credit is contemplated by the indorser, and that the demand should be made as quickly as the law will require upon a check or sight draft. * * * But * * * we think that a note payable on demand, with interest, is a continuing security, from which none of the parties are discharged until it is dishonored by an actual presentment and refusal to pay. * * * If the parties declare in the written instrument, which is the only evidence of their agreement, that the money shall be paid on call, with interest in the meantime, a productive investment of the sum for some period of time is plainly intended. What, then, is that period? The only answer which can be given is, that it is indefinite or indeterminative, and ascertainable only by an actual call for the money; and if that be the meaning of the principal parties, the indorser must be deemed to lend his name to the contract with the same intention. * * * We see no good reason why a note, like the one now in question, should not be construed precisely according to its terms and if we follow that construction such instruments are not dishonored by the mere efluxion of time." Although the decision in Merritt v. Todd was subsequently discussed and, in some cases, criticised, its authority was not shaken as establishing a rule of law, and it was expressly followed as late as in Parker v. Stroud (98 N. Y. 37). (See Herrick v. Woolverton, 41 N. Y., 581; Pardee v. Fish, 60 ib. 265; Crim. v. Starkweather, 88 ib. 339). Judge Comstock followed the doctrine of the English courts, in differentiating notes payable on demand, with interest, from those payable on demand merely. He sought to give effect, in the former case, to what seemed to be an intention of the parties that, notwithstanding the terms, there should be no immediate demand, and that the time of payment should be future; thus making the instrument a continuing obligation.

The law being thus settled in this State, the Negotiable Instruments Law was passed, in 1897, as the outcome of a general movement to bring about a uniform law in this country covering the subject of "Bills and Notes." It was a codification of the law, and, in the respect which we are considering, it modified the rule as formulated in Merritt v. Todd. It established one rule, which was to be applicable to all cases, that where an instrument "is payable on demand, presentment must be made within a reasonable time after issue." No distinction was to be made, as theretofore, when the instrumnt was an interest-bearing obligation. While, therefore, it must be regarded as changing the rule upon the subject of the time for the presentment of such instruments, by placing them upon the same footing, the fourth section of the law has to be given effect, which requires, in determining what is a reasonable time, a consideration to be had of the nature of the instrument, any usage of trade and the facts of the particular case. That would, certainly, be sufficient to authorize the differentiation of bills, or promissory notes, from other instrument for the payment of money; but, even where it is a question of the time within which a demand note must have been presented, the facts and circumstances of the case must be regarded. If a note is payable on demand, it is always mature and may at any time be demanded. The Statute of Limitations commences to run against the maker from its issue (Herrick v. Woolverton, 41 N. Y. 587). After its issue, what constitutes reasonableness of time for its presentment cannot be determined by any fixed rules; for, plainly, the particular circumstances may be such as to evidence some intention of the parties as to its continuance. And, certainly, they may be sufficient to justify an inference of unreasonable delay. In my opinion, what the Legislature intended to accomplish by the provisions of the Negotiable Instruments Law in question, was to do away with the distinction between notes, or bills, payable on demand, which Merritt v. Todd had created, and to leave the question of their reasonable presentment for payment, in order to charge the parties to them, as one for the determination of the court upon the facts. That question, if the facts were unsettled and the testimony was conflicting, might be a mixed one of law and fact, which the jury should decide, under the instructions of the court, as to the law; but, where they are ascertained and are not in dispute, the question is one of law (Aymar v. Beers, 7 Cowen, 705, 709; Mohawk Bank v. Broderick, 10 Wend. 304, 308; Carroll v. Upton, 3 N. Y. 272; Hunt v. Maybee, 7 ib. 266, 272). In the present case the defendant offered no evidence and there was no dispute about the facts. The trial judge had before him the facts of the discount of a demand note, bearing interest; that the indorsement by Zimmerman was without consideration and for the maker's accommodation;

that its payment was secured by the deposit of certain securities; that notwithstanding that, some two years after the making of the note, the plaintiff had complained to Zimmerman of its non-payment and twice, a year later, had written that the maker was in default as to the interest, no steps were taken to charge the indorser, by presentment of the note for payment and by protest for non-payment, until more than three and a half years had elapsed. If the finding that the note was not presented within a reasonable time depended for its justification upon the evidence, we should be, undoubtedly, concluded from reviewing it by the rule of unanimous affirmance. But viewing it, as I think we must, as a question of law to be decided by the court upon the ascertained facts, it depended upon the interpretation of the statute as applied to the facts, and, in my opinion, the decision of the trial court was correct.

It is argued by the appellant that the defense that the note was not presented within a reasonable time after its issue was one which should have been specially pleaded in the answer. This objection was not taken upon the trial, but, assuming that it could properly be raised upon the appeal, it is untenable. The burden is on the holder of a note, when seeking to charge an indorser, to prove due and timely presentment and the giving of notice to the indorser of its dishonor. The obligation of the indorser is conditional upon all the steps having been taken by the holder which the statute has prescribed as to presentment and as to notice of non-payment, &c. The Negotiable Instruments Law is the codification of the law merchant upon the subjects treated, and in setting forth what is required of the holder of a note, it casts upon him the burden to prove that the requirements were all complied with. They were necessary conditions of his right to recover. Presentment of a demand note within a reasonable time is a requirement of the statute, and the liability of the indorser to make good the contract of the maker, unlike that of a guarantor, is conditional and depends upon the holder having made a case under the statute of an obligation, which he has caused to mature, and by appropriate legal steps to become an indebtedness of all contracting parties. Therefore, I think it would be incorrect to hold of this defense that it is of an affirmative nature, and like the defense of usury, or any other defense which avoids an obligation, that it must be pleaded to be available.

No other question demands consideration, and for the reasons given I advise the affirmance of the judgment, with costs.

CULLEN, Ch. J.; EDWARD T. BARTLETT, HAIGHT, WILLARD BARTLETT and CHASE, JJ., concur; VANN, J., concurs in result.

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That nonresidents may be denied permission to act as executors of local estates is affirmed in *Re* Mulford (Ill.), 1 L. R. A.)N. S.) 341.

Constitutional Law.

RIGHT OF EMPLOYER TO MAKE EMPLOYMENT CONDITIONAL UPON EMPLOYEE NOT JOINING LABOR ORGANIZATION.

NEW YORK COURT OF APPEALS.
Decided May 25, 1906.

THE PEOPLE OF THE STATE OF NEW YORK, appellant, v. HARRY MARCUS, respondent.

Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered January 10, 1906, reversing a judgment of the Court of Special Sessions, First Division, in the city of New York, convicting the defendant of a misdemeanor. The facts, so far as material, are stated in the opinion.

William Travers Jerome, district attorney (Robert S. Johnstone of counsel), for appellant; Elias B. Goodman, Ernest F. Eidlitz and Frederick Hulse, for respondent.

CHASE, J.—It is provided by section 1 of the fourteenth amendment of the Constitution of the United States that . . . "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

It is provided by section 1 of article one of the Constitution of the State of New York that "No member of this State shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers." And by section 6 of said article that no person shall ". . . be deprived of life, liberty or property, without due process of law . . ."

The free and untrammeled right to contract is a part of the liberty guaranteed to every citizen by the Federal and State Constitutions. Personal liberty is always subject to restraint when its exercise affects the safety, health or moral and general welfare of the public, but subject to such restraint an employer and employee may make and enforce such contract relating to labor as they may agree upon.

In 1887 the Legislature added to the Penal Code section 171a, as follows: "Any person or persons, employer or employers of labor, and any person or persons of any corporation or corporations on behalf of such corporation or corporations, who shall hereafter coerce or compel any person or persons, employee or employees, laborer or mechanic, to enter into an agreement, either written or verbal from such person, persons, employee, laborer or mechanic,

not to join or become a member of any labor organization, as a condition of such person or persons securing employment, or continuing in the employment of any such person or persons, employer or employers, corporation or corporations, shall be deemed guilty of a misdemeanor."

The constitutional right of the Legislature to enact that section of the Penal Code is challenged by the defendant, and the question is now presented for consideration because of the arrest and conviction of the defendant for a violation thereof.

On December 1, 1904, the H. Marcus Skirt Company, a corporation, as the party of the first part, and H. Scheinbaum, as the party of the second part, entered into an agreement, the material parts of which are as follows:

"Party of the first part agrees to employ party of the second part as a piece worker, and party of the first part agrees to pay for all finished work only on each and every Tuesday. Party of the second part hereby agrees not to belong to any labor union or to take part in any strike against party of the first part, and to work as an individual in the open shop of party of the first part.

"Party of the second part further agress that in the event of not complying with all the articles herein mentioned to forfeit to the party of the first part his money due for all work unpaid.

"Party of the second part also agrees to deposit $1 each week, which will be deducted from his salary until the amount reaches $10; same to be held as a forfeit in the event of his not complying with all the above stipulations.

"H. Marcus Skirt Company agrees to keep party of the second part employed as long as he proves satisfactory."

Thereafter an information was filed in a Court of Special Sessions in which it alleged that the defendant is a person of such corporation, and as such employer of labor, and that he "did on behalf of such corporation, and as such employer of labor, coerce and compel one Hyman Scheinbaum to enter into a written agreement on the part of and from him the said Hyman Scheinbaum not to join or become a member of any labor organization as a condition of the said Hyman Scheinbaum securing employment from and continuing in the employment of the said H. Marcus Skirt Co."

On such information a warrant was issued and the defendant was arraigned and pleaded guilty. He thereupon made a motion in arrest of judgment upon the ground "that it appears upon the face of the information that the facts therein stated do not constitute a crime, . . . that the statute upon which said information is based contravenes the fourteenth amendment of the Constitution of the United States, and is, therefore, null and void, and that said statute contravenes the Constitution of the State of New York in that it restrains the right to free contract for a purpose not calculated, intended, convenient or appropriate to protect the public health or to serve the public comfort or safety."

The motion in arrest of judgment was denied and the defendant was fined $5, which he paid under protest, and an appeal was taken to the Appellate Division, which reversed the judgment of conviction (People v. Marcus, 110 App. Div. 255). From the order of reversal this appeal is taken.

The legislative intent in the use of the words "coerce or compel" in said section of the Penal Code is apparent on reading the section. They were not intended to refer to physical violence or interference with the person of the employee. In Lochner v. New York (198 U. S. 45), the court in construing the words of section 110 of the Labor Law (chap. 415, Laws of New York, 1897), as follows: "No employee shall be required or permitted to work in a biscuit, bread or cake bakery . . . more than sixty hours in any one week, or more than ten hours in any one day," say: "The mandate of the statute . . . is the substantial equivalent of an enactment that no employee shall contract or agree to work more than ten hours per day." In the case now before us the mandate of the statute is the substantial equivalent of an enactment that a person shall not make the employment or the continuance of an employment of a person conditional upon the employee not joining or becoming a member of a labor organization. There is nothing in the information upon which the warrant against the defendant was issued to show that there was any interference with the freedom of Scheinbaum in deciding whether he would enter into the contract with the corporation.

The courts of this State recognize the right of employees and employers to organize and co-operate for any lawful purpose. Contracts for labor may be freely made with individuals or a combination of individuals, and so long as they do not interfere with public safety, health or morals, they are not illegal. The views of this court as to what constitutes freedom to contract in relation to the purchase and sale of labor and as to what contracts relating thereto are lawful and enforcible, were stated with much detail and ability by the members of the court when the cases of Nat. Protective Ass'n v. Cumming (170 N. Y. 315), and Jacobs v. Cohen (183 N. Y. 207), were decided, and the decisions in those cases are substantially controlling in the determination of this appeal.

In National Protective Association v. Cumming (*supra*), it was said that a person may refuse to work for another on any ground that he may regard as sufficient and the employer has no right to demand a reason for it, but even if the reason is that the employee refuses to work with another who is not a member of his organization, it does not affect his right to stop work or to refuse to enter upon an em-

ployment. The converse of this statement must be true, and an employer of labor may refuse to employ a person who is a member of any labor organization or he may make an employment conditional upon the person employed refraining from joining or becoming a member of a labor organization. It is a well known fact that combinations of employees and also of employers require their members to do or refrain from doing many things which they deem to their individual and combined advantage while a person not a member of such an organization can act in accordance with the terms of such agreement as he may choose to make. A person employing labor may decide that it is to his advantage to employ only union labor and be willing to enter into an agreement necessary to procure such labor, or he may decide that it is to his advantage to employ non-union labor, in which case he may also decide that it is to his advantage to make the employment conditional upon an agreement that such employee will not join or become a member of a labor organization.

In Jacobs v. Cohen (*supra*), an employees' union sued certain manufacturing employers on a promissory note given by them as collateral security to be applied as liquidated damages for the violation of a certain agreement by which the manufacturing employers agreed not to employ any help whatsoever other than members of said labor union who should procure a pass card showing that they were in good standing in said union, and by which they further agreed to conform to the rules and regulations of said union and cease to employ any one not in good standing in said union, and by which they further agreed to many restrictive and other provisions relating to the conduct of their business, which are stated more fully in the prevailing and dissenting opinions in this court. The answer in the second separate defense alleged in substance that the contract was in restraint of trade, and that its purpose is to combine employers and employees whereby the freedom of the citizen in pursuing his lawful trade and calling is, through said contract, combination and arrangement, hampered and restricted, and that it is also for the purpose of coercing workmen to become members of a particular employees' organization under penalty of loss of position and deprivation of employment, and that it is against public policy and unlawful. Two questions were submitted to this court, viz.:

"I. Is a contract made by an employer of labor, by which he binds himself to employ and to retain in his employ only members in good standing of a single labor union, consonant with public policy and enforcible in the courts of justice in this State?"

"II. Is the 'second' separate defense, contained in the answer herein of the defendants Morris Cohen and Louis Cohen insufficient upon the face thereof to constitute a defense?" Both of these questions were answered in the affirmative, and the court say: "Whatever else may be said of it, this is the case of an agreement voluntarily made by an employer with his workmen, which bound the latter to give their skilled services for a certain period of time, upon certain conditions, regulating the performance of the work to be done and restricting the class of workmen who should be engaged upon it to such persons as were in affiliation with an association organized by the employer's workmen with reference to the carrying on of the very work. It would seem as though an employer should be unquestionably free to enter into such a contract with his workmen for the conduct of the business without its being deemed obnoxious upon any ground of public policy. If it might operate to prevent some persons from being employed by the firm, or, possibly, from remaining in the firm's employment, that is but an incidental feature. Its restrictions were not of an oppressive nature, operating generally in the community to prevent such craftsmen from obtaining employment and from earning their livelihood. It was but a private agreement between an employer and his employees concerning the conduct of the business for a year, and securing to the latter an absolute right to limit the class of their fellow-workmen to those persons who should be in affiliation with an organization entered into with design of protecting their interests in carrying on the work."

That freedom to contract which entitles an employer to make by agreement his place of business wholly within the control of a labor union entitles him, if he so desires, to require of his employees that they be wholly independent of any labor union.

The order of the Appellate Division should be affirmed.

EDWARD T. BARTLETT, J. (dissenting)—I vote to reverse the order of the Appellate Division and to affirm the judgment of conviction. The freedom to contract should be untrammeled; a person desiring employment ought not to be required to abstain from joining any labor organization, nor should he be compelled to join a labor organization. One requirement is as pernicious as the other.

The statute under consideration might well have covered both cases.

CULLEN, Ch. J., GRAY, HAIGHT, VANN and WILLARD BARTLETT, JJ., concur with CHASE, J.; EDWARD T. BARTLETT, J., reads dissenting memorandum.

Order affirmed.

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Property hidden in the earth near a marked tree is held, in Ferguson v. Ray (Or.) 1 L. R. A. (N. S.) 477, not to have been lost, so as to vest title in the finder as against the owner of the soil, although it had remained so long as to indicate that the owner was dead or had forgotten it.

Settlement of Accident Suit with Plaintiff After Notice of Attorney's Lien.

DEFENSE OF ACTION SUBSEQUENTLY BROUGHT BY ATTORNEY ON THE GROUND THAT HIS CONTRACT WITH HIS CLIENT WAS UNCONSCIONABLE.

NEW YORK COURT OF APPEALS.
Decided June 21, 1906.

WILMOT L. MOREHOUSE, respondent, v. THE BROOKLYN HEIGHTS RAILROAD COMPANY, appellant, and JONAS NATHAN.

Appeal from a judgment of the Appellate Division, Second Department, unanimously affirming a judgment entered upon a decision.

Charles L. Woody and George D. Yeomans, for appellant; Wilmot L. Morehouse, in person, for respondent.

HAIGHT, J.—This action was brought to recover of the defendant, Jonas Nathan, for services rendered to him by the plaintiff as an attorney at law in the commencement of an action for Nathan against the Brooklyn Heights Railroad Company, and to enforce plaintiff's lien against the railroad company.

On the 19th day of February, 1902, the defendant Nathan received personal injuries on the defendant's railroad while a passenger in one of its cars, and thereupon he entered into a written agreement with the plaintiff to prosecute an action therefor, for which he agreed to pay the plaintiff 50 per cent. of whatever might be recovered in the action by way of settlement or otherwise, together with the costs, allowances and disbursements thereon as compensation for his services. Shortly thereafter the plaintiff did bring an action against the railroad company by the service of a summons and complaint, which action was subsequently settled by the defendant Nathan, the railroad company paying to him the sum of $2,000. The trial court has found as a fact that the settlement so made by the railroad company was honest and binding upon the plaintiff, but that the plaintiff, at the time of serving the summons and complaint, had also served upon the railroad company a notice of his lien for 50 per cent. Judgment was thereupon awarded against the defendant for the sum of $1,000, with the provision that execution first issue against the defendant Nathan, and if it should be returned unsatisfied, then the plaintiff have execution against the defendant railroad company. The defense interposed by the railroad company was that the contract between Nathan and the plaintiff was unconscionable, and, therefore, illegal and void. Most of the evidence taken upon the trial bore upon this issue. At the conclusion of the evidence the trial court rendered a decision in writing, containing findings of fact and conclusions of law to which reference has already been made, but containing no finding either way upon the question as to whether the contract was unconscionable and illegal and void. The defendant had submitted requests to find bearing upon this issue, to the effect that the contract was unconscionable, which requests were marked "refused." In disposing of the case the trial judge filed his opinion, in which he stated that the claim of the defendant that the contract was unconscionable, and would not, therefore, be enforced by the court, was not available to the defendant railroad company, for the reason that if the company still had the $2,000 in its possession it could not raise such a question, as it would be a matter between the attorney and client only, and he did not think the company was in any better position after having paid the money in its own wrong. Exceptions were taken to the findings of fact and conclusions of law of the trial court, and to its refusals to find as requested.

I think the defense interposed by the defendant company was available to it, and that it should have been determined either one way or the other by the trial court. It is true the defendant company paid out its $2,000 in settlement of the action brought against it, but this, as the trial justice has found, was honestly done, and consequently was not for the purpose of defrauding the plainti out of his compensation. It is true that this payment was made after notice of the lien had been served by the plaintiff upon the company. How the company came to make the payment after such notice is not disclosed by the record. Whether it was overlooked or forgotten we are not advised. The company, however, has honestly settled the case and paid the money to Nathan, as it had the right to do, upon the understanding that he would settle with his attorney for the services he had received. (Fischer-Hansen v. B'klyn Heights R. R., 173 N. Y. 492.) Nathan thereby became primarily liable to pay the plaintiff herein for his services in the litigation, and the defendant company only became liable to pay in case collection through execution against Nathan could not be made. In effect it became his surety. Such is the judgment entered herein. It therefore appears to me that the defendant company became subrogated to the rights of the defendant Nathan, and had the right to avail itself of any defense to the action that Nathan had. In the case of Pease v. Egan (131 N. Y. 262-272), Peckham, J., in commenting upon the general rule of subrogation, refers to a statement of Chief Justice Marshall, to the effect "that equity would clothe the party thus paying with the legal garb with which the contract he has discharged was invested, and it would substitute the party paying to *every* equitable interest and purpose in the place of the creditor whose debt he has discharged." And again later on, after referring to the cases of Gans

v. Thieme (93 N. Y. 225) and Arnold v. Green (116 N. Y. 566), says, with reference to them, that they are "evidences of the rule that no contract need subsist upon which to base the right of subrogation, and that it is a remedy which equity seizes upon in order to accomplish what is just and fair between the parties." In Mathews v. Aiken (1 N. Y. 595), Johnson, J., says: "It is a general and well established principle of equity that a surety, or a party who stands in the situation of a surety, is entitled to be subrogated to all the rights and *remedies* of the creditor whose debt he is compelled to pay." (Hinckley v. Kreitz, 58 N. Y. 583; Johnson v. Zink, 51 N. Y. 333; Lord v. Tiffany, 98 N. Y. 412; Wheeler v. Sweet, 137 N. Y. 435.)

Of late years the subject of attorneys' fees and their manner of procuring contracts of retainer, especially in negligence cases, have attracted the attention of both the public and the courts. The charges made in some cases have been exorbitant, if not scandalous, and have tended in a measure to bring the profession into disrepute. It is contended that a claimant who is poor and unable to pay his attorney in cash ought to be permitted to contract to pay a portion of his claim to his attorney, in order to procure his services. The validity of such contracts is not questioned. It is only where the attorney has taken advantage of the claimant, by reason of his poverty or the surrounding circumstances, to extort an unreasonable and unconscionable proportion of such claim that it is condemned. The Federal courts have recently, in two instances, characterized a contract of retainer giving to the attorney 50 per cent. of the recovery as unconscionable (Herman v. Met. St. Ry., 121 Fed. Rep. 184; Muller v. Kelly, 125 Fed. Rep. 213). The Appellate Division in the First Department has also denounced such contracts. The question, however, as to whether such a contract is unconscionable is one of fact depending upon the character of the claim and the amount of services to be renedered in prosecuting it to judgment. An agreement to pay an attorney one-half of the recovery, where the action was to recover a penalty of $50, would not by any person be considered to be improper, but if it was for $50,000 it might be considered quite improper. So that the mere fact that the attorney under the agreement was to receive one-half does not render it unconscionable, unless it appears from the evidence that it was induced by fraud, or, in view of the nature of the claim, that the compensation provided for was so excessive as to evince a purpose on the part of the attorney to obtain an improper or undue advantage over his client Matter of Fitzsimmons, (174 N. Y. 15). As we have seen, the defendant, in the case under consideration interposed the defense that the contract in this case was unconscionable. and, theerfore, void, and that evidence was produced upon the trial bearing upon this defense. The defendant company, therefore, had the right to have that issue determined by the trial court. This, as we have seen, the trial judge refused to do, for the reason, as he states in his opinion, that the defense was not available to it. It is suggested, however, that the opinion cannot be considered in determining the effect that should be given to the refusal to find the defendant's requests, and that the refusal should be construed as a determination on the part of the trial court of the issues so presented for its decision. While we require the opinions written to be printed and made a part of the record, they do not form a part of the judgment roll. We do not, therefore, look to the opinions for the purpose of determining the contents of an order, finding, or judgment, or its meaning. We only examine the opinions for the purpose of ascertaining the arguments made and the reasons given in support of the rulings and determinations made by the court whose order or judgment is under review (Salmon v. Gedney, 75 N. Y. 479-481; Tilton v. Beecher, 59 N. Y. 176-182; Fisher v. Gould, 81 N. Y. 228; Dibble v. Dimick, 143 N. Y. 549-554; Koehler v. Hughes, 148 N. Y. 507). Under the practice as it existed prior to 1894 a party could submit to the trial court, or referee, requests to find, and the court or referee was empowered to mark upon the margin his determination as to each request. This he either filed or returned to the attorney presenting the request, and such attorney might file an exception to any refusal to find as requested and present the same for review before an appellate tribunal. But the provision of section 1023 of the Code of Civil Procedure authorizing this practice was repealed in the year stated and was not re-enacted to take effect until September 1, 1904. So that in the meantime there was no provision of the Code authorizing requests to find, or requiring the court to pass thereon, or of allowing parties to take exceptions to refusals as requested. The requests to find in this case were presented during this interval, and it consequently follows that the court was not required to make any of the findings requested. But it is said that the trial court did pass upon the requests by refusing them. Very true, he marked them all "refused." Why he refused them he did not state. He properly could have refused them for the reason that the requests were not authorized by the Code, and the rulings made thereon had no force or effect, inasmuch as they were not subject to an exception or to a review on appeal. But to go farther and assume that the provisions of section 1023 of the Code were in force at the time, and that an exception could be taken to the rulings made upon request, and that such exception could be reviewed on appeal. Even then a refusal to find a fact requested is not equivalent to an affirmative finding to the contrary. If it were a judgment might be based upon a decision made up wholly of refusals, thus completely nulli-

fying the plain provisions of section 1022 of the Code, which require that the decision must state separately the facts and the conclusions of law and direct the judgment to be entered thereon. A judgment, therefore, must be based upon facts found, not facts refused. This precise question was considered by this court in the case of Galle v. Tode (148 N. Y. 270-277). The opinion is as follows: "It is contended on behalf of the respondents that the defendants Levi and Materne were parties and privies to the fraudulent intent of Tode and Wulling. There is, however, no direct finding to that effect. A finding was requested that the defendants Levi and Materne had no knowledge of the intent of Tode and Wulling to defraud their creditors and the request was refused. *But the refusal to find a fact is not tantamount to a finding against a fact, unless the intention of the court to be so understood is clearly apparent.* The refusal to find may rest upon other considerations; the evidence may not be regarded as satisfactory either for or against, or the mere fact may not be regarded as material in the determination of the controversy." In the case of Meyer v. Amidon (46 N. Y. 169-171), the action was founded upon fraud and deceit. The referee had found that the representations made by the defendant were false; that the plaintiffs were induced thereby to give credit, and that damages ensued therefrom. He did not find that the representations were fraudulent, nor that the defendant believed or had reason to believe when he made them that they were false, nor that he assumed or intended to carry the impression that he had actual knowledge of their truth. He did not find that the defendant had any intent to deceive or defraud the plaintiffs. The defendant requested the referee to find that the representations were made without fraud. The referee refused so to find otherwise than as contained in his findings of fact. It was held that the findings did not establish a cause of action against the defendant, nor sustain the conclusions of law found by the referee; that the refusal of the referee to find that the representations were made without fraud and without intent to deceive would not be presumed that he did in reality find that they were made with fraud and intent to deceive (see, also, Lawrenceville Cement Co. v. Parker, 39 N. Y. S. R. 864). I am, therefore, of the opinion that the failure of the trial court to find upon the issue so raised by the pleadings and the evidence given upon the trial, resulted in a mistrial (Miller v. N. Y. & North Shore Ry., 183 N. Y. 123; Dougherty v. Lion Fire Ins. Co., 183 N. Y. 302).

The judgment should be reversed and a new trial granted, with costs to abide the event.

CULLEN, Ch. J.; O'BRIEN, EDWARD T. BARTLETT, HISCOCK and CHASE, JJ., concur; GRAY, J., absent. Judgment reversed, &c.

Law of Our Insular Possessions.

COMMON LAW ACTION FOR A WRONGFUL AND A MALICIOUS ATTACHMENT UNKNOWN TO PORTO RICAN PROCEDURE.

SUPREME COURT OF THE UNITED STATES.
No. 1.—October Term, 1905.

JOSE ANTONIO FERNANDEZ Y PEREZ, Plaintiff in Error, v. JOSE PEREZ Y FERNANDEZ.

In error to the District Court of the United States for the District of Porto Rico.

An action at law was begun November 18, 1901, in the United States District Court for the District of Porto Rico by the defendant in error, Jose Perez y Fernandez, against Jose Antonio Fernandez y Perez, to recover in an action for "trespass upon the case for wrongful attachment." The declaration contained the usual averments of a declaration in a common law action and averred that the attachment had been issued maliciously and without probable cause, and levied upon a certain two-story house then belonging to the defendant in error, in Mayaguez, Porto Rico. One Rafael Diaz Aguerria was made co-defendant, and it was averred that the attachment was issued in a suit brought by Fernandez as attorney in fact and agent of Aguerria, who authorized and ratified the acts complained of. It appeared that the defendant in error Perez had owed about 6,000 pesos to one Claudio Barro, who died, leaving a will in which Rafael Diaz Aguerria was named as executor. The will was probated in Spain, and Aguerria qualified there as executor of the estate. Perez, on November 10, 1899, recorded a mortgage in favor of one Don Victor Ochoa y Perez for 20,000 pesos. The suit in which the attachment was issued was begun January 2, 1900, by the filing of a declaration to recover on certain notes, and was brought in the name of Aguerria as executor of the last will and testament of Claudio Barro. The action was begun in the military court established by the authority of the United States after the cession of Porto Rico, called the United States Provisional Court for the Department of Porto Rico, which court was succeeded by the United States District Court. On the date of the beginning of the suit an affidavit for attachment was filed, which was sworn to by Fernandez, plaintiff in error, purporting to have the power of attorney of Rafael Diaz Aguerria, executor of the last will and testament of Claudio Barro, the ground alleged being that the affiant had reason to believe that the defendant intended to and would fraudulently part with or conceal his property before judgment could be recovered against him, so that the judgment could not be satisfied out of the property. The summons

was issued, and a writ of attachment was levied upon the premises of the defendant in error, and notice posted thereon. Further proceedings were arrested by an injunction proceeding in the United States Court, brought by Jacinto Perez Barro, heir of Claudio Barro, deceased, upon the ground that Aguerria, plaintiff in the attachment proceeding, suing as executor of the will probated in Spain, had not taken out ancillary letters in Porto Rico. The action for malicious attachment was joint in form and the summons was returned as to Aguerria that the marshal was unable to find him within his district. The declaration averred that he was a resident of Porto Rico, but he was never served with summons in this case. Fernandez demurred to the declaration, averring that it appeared on its face that he was acting as the duly authorized agent of Aguerria, and was neither principal nor party plaintiff to the action against Perez, the defendant in error. This demurrer was overruled and no exception taken to such action by Fernandez. Afterwards the general issue was filed, the case was tried to a jury without objection and upon a charge of the court, substantially leaving to the jury the question whether Fernandez had caused the attachment to issue and be levied maliciously and without probable cause, to the injury of the standing and credit of the defendant in error as a merchant. A verdict was returned in favor of the defendant in error for the sum of $7,000, upon which a motion for a new trial was overruled and judgment entered.

Mr. Justice Day, after making the foregoing statement, delivered the opinion of the court.

This case was argued orally and upon briefs at the October term, 1904, of this court. After the case had been argued and submitted, on December 5, 1904, an order was entered as follows:

"No. 6. Jose Antonio Fernandez y Perez, Plaintiff in Error, v. Jose y Fernandez. Counsel are requested to submit additional briefs on these points:

"1. Can this court, on the record of this case, properly consider and determine the contention of the plaintiff in error that a civil action like the present one was, at the date of the attachment and the commencement of this action, unknown to and unauthorized by the laws and jurisprudence of Porto Rico?

"2. Was a civil action like the present one known to the laws and jurisprudence of Porto Rico at the time the attachment in question was sued out?

"3. Under the law of civil procedure as existing in Porto Rico at the time of the attachment proceeding complained of, could the damages herein claimed have been allowed or assessed in that proceeding upon the dissolution of discharge of the attachment? If so, was that mode exclusive of every other for ascertaining such damages?"

Our views in this case will be practically in answer to these questions.

The case affords a striking illustration of the difficulty of undertaking to establish a common law court and system of jurisprudence in a country hitherto governed by codes having their origin in the civil law, where the bar and the people know little of any other system of jurisprudence. The action in this case was begun and tried upon pleadings and under principles which are controlling in a State following the common law, having its origin in England, and the case was submitted to the jury upon general principles governing such actions for the recovery of damages for the seizure of property upon writs of attachment issued maliciously and without probable cause. The action proceeded in all respects in form and substance as it would had it been begun and prosecuted in a comman law state.

Cases which have come to this court from the Philippines and Porto Rico, where we have had occasion to consider the enactments making changes in the laws of those islands, show the disposition of the Executive and Congress not to interfere more than is necessary with local institutions, and to engraft upon the old and different system of jurisprudence established by the civil law only such changes as were deemed necessary in the interest of the people, and in order to more effectually conserve and protect their rights. Kepner v. United States (195 U. S 100, 122). This policy has been followed in dealing with the Porto Ricans. (President's Message, Dec. 5, 1899; Walton's Civil Law in Spain and Spanish America, 594.) The new civil government was established by the act of April 12, 1900, commonly known as the Foraker act. (31 Stat. 77.) Section 8 of that act provides: "That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States."

The first inquiry then to which we shall direct attention concerns the law in force at the time of the passage of this act in Porto Rico, governing the issuing of attachments and the recovery of damages for wrongfully causing the same to issue and be levied. The additional briefs filed by counsel upon both sides in this case since the order of the court of December 5, 1904, above quoted, exhibit commendable zeal and industry in investigating this question and bringing to the attention of the court the Spanish treatises and cases throwing light upon the subject. Upon behalf of the defendant in error it is insisted that the action is governed by Article 1902 of the Civil Code of Porto

Rico, which provides: "Art. 1902. A person who by an act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage so done." (War Department Translation of the Civil Code in force in Cuba, Porto Rico and the Philippines, 244.) Much discussion is had in the briefs as to the meaning of this section, and whether the term "fault"—"culpa" in the Spanish jurisprudence—is broad enough to include actions brought to recover for conduct which is alleged as malicious, as distinguished from those where the basis of the recovery is a careless act or omission which does not have for its motive the intention to cause damage.

In the view we take of this case we do not find it necessary to consider the authorities cited, or the views pressed pro and con as to whether a malicious act, such as is complained of in this case, is within the terms of this article of the Code. The references to sections of the Code of Procedure show a comprehensive system specially provided for the issuing of attachments and the recovery of damages where the same were wrongfully procured to be allowed. The subject of attachment of property is treated in Title XIV, Law of Civil Procedure, War Department translation, Article 1395 *et seq.* Unlike ordinary American procedure, an attachment is issued by order of the judge and certain grounds are recognized. They are summarized as follows: "If the debtor be a foreigner; or if, being a citizen he has no known domicil, or does not own real estate, or does not have any place of business at which the payment of the debt may be demanded. It may also be ordered, without any such attendant condition, if he has disappeared from his home or place of business, leaving no one in charge, or if he conceals himself, or if there be reasonable grounds for believing that he will conceal or undersell his property to the prejudice of creditors." (Art. 1398.) If it shall turn out that the attachment was wrongfully procured, ample provisions are made for the adjudication and recovery of damages in the action. See Articles 1409-1415, which are set forth in the margin.*

The theory of these sections of the code is that when the court which issues the attachment is satisfied that the same has been wrongfully issued, it will proceed in the manner pointed out in the statute to ascertain the loss and damages which the defendant has suffered, and in the same action to tax the costs against the plaintiff and to adjudge him to indemnify the defendant for such losses and damages. And these losses and this recovery are adjudicated in the manner pointed out in Articles 927 *et seq.* of the Code of Civil Procedure. These articles are found in Title VIII of that code, entitled "Execution of Judgments." The defendant in the attachment having been declared entitled to recover damages, proceedings follow for the purpose of ascertaining the amount thereof. Section 927 *et seq.* provide for the manner of making up an issue, taking testimony and hearing witnesses, and, upon final order or decree made by the court, an appeal can be prosecuted. This full and comprehensive statutory method of ascertaining and adjudging the damages to be recovered in cases where attachments are wrongfully issued and vacated for any cause, would seem to preclude the application of general provisions of the Code giving a right of recovery for acts of fault or negligence.

We are not cited to any decision of the Supreme Court of Spain expressly adjudicating this matter, but are referred by counsel on both sides to a treatise on the law of civil procedure ("Commentario a la Ley de Enjuiciamiento Civil," Edition of 1891, p. 412), by Senor Jose Maria Manresa y Navarro, said to be a textwriter of the highest authority in Spain. The English translation of his text is given as follows: "We do not think that this rule (relating to independent actions for damages under the mortgage law) is applicable to attachments, because on the motion to vacate an attachment no discussion or proof of the existence of losses and damages is allowed, and because the law itself provides, in addition to this, that, when by final order of the court, an attachment is vacated, the plaintiff be adjudged to pay the defendant his

* Art. 1409. A person who has requested and obtained a provisional seizure for an amount of more than 1,000 pesetas must request the ratification thereof in an executory action or in the delaratory action which may be proper, filing the corresponding complaint within twenty days after the levying of the attachment. Upon the expiration of this period without the action having been instituted or a ratification of the seizure having been requested, the latter shall be null *de jure*, and shall be without effect at the instance of the defendant without the plaintiff being heard. A petition for a rehearing may be made against this ruling, and if it should not be granted, an appeal for a stay and review of the proceedings may be interposed.

Art. 1410. Notwithstanding the provisions of the foregoing article, if the debtor should be included in any of the cases of Article 1398, the provisional seizure may also be ordered after the institution of the action, a separate record being made thereof. The provisions contained in Articles 1399 to 1410, inclusive, shall be applicable to this case, and after the attachment has been levied the proceedings thereupon shall be continued as prescribed for incidental issues. When an attachment is vacated by a final ruling, because it is not included in any of the cases

losses and damages, they being ascertained in the manner provided in Article 1417,† that is, according to the procedure in Article 928 *et seq.* Such a proceeding permits of a discussion, if the issue is made, not only of the amount but of the existence of losses and damages. It follows that the court can decide on both questions without the necessity of a new suit, which is precisely what the law has sought to avoid." This seems to be a direct authority for the proposition that this plan of recovery of damages for wrongful attachments is exclusive. In the absence of authority to the contrary, and in view of the plain provisions of the Code, we accept it as properly declaring the existing law upon the subject. We reach the conclusion that the Porto Rican system in force at the time of the passage of the Foraker act, and binding until changed or amended, provided in the state of affairs shown by this record, a recovery for damages in the method pointed out in the attachment suit, by the special statutory method provided for, and not otherwise.

The difference between the liability of one wrongfully levying an attachment at common law and the assessment of costs and damages under these provisions of the Porto Rican Code is not one of form merely. The former action is substantially one for malicious prosecution, and can be maintained only upon proof of malice and want of probable cause. Under the Code remedies given in Porto Rico the court is required to assess damages, although malice or want of probable cause in suing out the attachment may not be expressly shown. The remedy given seems to cover all cases, where the attachment is vacated, irrespective of the motive in suing it out.

This brings us to briefly inquire as to the nature and extent of the jurisdiction and practice of the United States courts in Porto Rico. Section 34 of the Foraker act established a United States District Court of Porto Rico and gave to it, in addition to the ordinary jurisdiction of a District Court of the United States, jurisdiction of all cases cognizant in the Circuit Courts of the United States, and provides that it shall proceed therein in the same manner as a Circuit Court, the intention of Congress obviously being to establish a United States court in Porto Rico, having like jurisdiction of both District and Circuit Courts of the United States in the States. Section 914 of the Revised Statutes of the United States provides: "The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding." The act of August 30, 1888 (25 Stat. 433), provides that the Circuit Courts of the United States shall have original jurisdiction concurrent with the courts of the several States in suits at common law and in equity.

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of said Article 1398, the plaintiff shall be taxed all the costs and be adjudged to indemnify the defendant for any losses or damages he may have suffered, which shall be recovered in the manner prescribed in Article 1415.

Art. 1411. When the provisional seizure becomes of no effect by reason of its having become null *de jure*, in accordance with Article 1409, the surety shall be ordered cancelled in the same ruling, if any should have been furnished, or what may be proper shall be ordered for vacating the attachment and cancelling the cautionary notice, in a proper case, and all costs shall be taxed against the plaintiff, who shall also be adjudged to indemnify the defendants for any losses and damages he may have incurred. If the attachment should be vacated for any other reason, the ruling thereupon shall also determine what may be proper according to the cases with regard to costs and the indemnification of losses and damages which may have been suffered.

Art. 1412. If the acknowledgment of a signature or of the written evidence of a debt should not be made or be delayed through the fault of the debtor, and if the filing of the complaint and the ratification of the attachment should depend thereupon, the time lost in obtaining said acknowledgment shall not be included in the period of time prescribed in Article 1409.

Art. 1413. If the owner of the property seized should request it, the attachment creditor must file his complaint within the period of ten days, unless any of the circumstances mentioned in the foregoing article is attendant. Should he not do so, the attachment shall be vacated, and the costs, losses and damages shall be taxed against him.

Art. 1414. After the provisional seizure has been levied the debtor may object thereto and request that it be vacated, with indemnification of losses and damages, if not included in any of the cases of Article 1398. He may make this petition within the five days following that of the notice of the ruling ratifying the seizure, or before that time, if he should deem it proper, and it shall be heard and determined in a separate record in accordance with the procedure prescribed for incidental issues.

Art. 1415. In cases in which there is an adjudication of losses and damages, as soon as the ruling thereupon becomes final, they shall be recovered according to the procedure established in Articles 927 *et seq.*

† Art. 1415, Porto Rican Code.

We think it was the intention of Congress in the Porto Rican act to require the District Court exercising the jurisdiction of a Circuit Court, in analogy to the powers of the Circuit Courts in the States, to adapt themselves, save in the excepted cases in equity and admiralty, to the local procedure and practice in Porto Rico. This conclusion is in accord with the policy of the United States, evidenced in its legislation concerning the islands ceded by Spain, and secures to the people thereof a continuation of the laws and methods of practice and administration familiar to them, which are to be controlling until changed by law.

In the Revised Statutes of the United States, section 915, it is provided as to attachments: "In common law causes in the Circuit and District Courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the State in which such court is held, for the courts thereof; and such Circuit or District Courts may from time to time, by general rules, adopt such State laws as may be in force in the States where they are held in relation to attachments and other process: Provided, That similar preliminary affidavits or proofs and similar security, as required by such State laws, shall be first furnished by the party seeking such attachment or other remedy." By amalogy it would seem that the District Court of Porto Rico, exercising the jurisdiction of a Circuit Court in its practice as to the issuing of attachments, is to adapt itself to the local practice recognized and established in Porto Rico. Circuit Courts of the United States are not governed by any separate attachment law, but are required to administer the remedy in attachment provided in the laws of the State in which the courts are held. Bates et al. v. Days (17 Fed. Rep. 167).

It is further objected on the part of the defendant in error that Porto Rican procedure can have no application to this action against Fernandez, because he was not a party plaintiff to the attachment suit, and the statute provides that the costs of the attachment and damages shall be assessed against the plaintiff in the action. We do not perceive that this fact affects the determination of the question as to the proper remedy in such cases. There is nothing in this action to show that Fernandez was not authorized to bring the suit and take out the attachment in behalf of the plaintiff in that suit, in which event Aguerria would be liable for the acts of his agent in that behalf. Nor is there any reason why Fernandez might not be made a party to the attachment proceeding if damages were to be assessed against him alone.

It is further objected that the United States Court has no method by which it can assess these damages in the manner required in the Porto Rican Code. In giving the remedies provided therein and assessing he damages we see no reason why that court cannot adapt itself to the requirements of the local Code and administer the remedies therein provided. In Traction Company v. Mining Company (196 U. S. 239), it was held that the Federal Court might follow the methods required by the Kentucky statute in administering the local law for the condemnation of property, so far as required to meet the needs of justice. In that case the local law required the appointment of appraisers by the court to assess compensation for the property taken. Speaking of the judicial power of a Circuit Court of the United States administered in such courts it was held: "In the exercise of that power a Circuit Court of the United States, sitting within the limits of a State and having jurisdiction of the parties, is, for every practical purpose, a court of that State. Its function, under such circumstances, is to enforce the rights of parties according to the law of the State, taking care, always, as the State courts must take care, not to infringe any right secured by the Constitution and the laws of the United States." In view of the provisions of the Foraker act, continuing local laws in force, this reasoning has application to the powers of the United States Court in that territory. There can be no difficulty in exercising the attachment remedies provided in the Porto Rican Code, if the attachment shall turn out to have been wrongfully issued, and making an assessment of damages in the manner provided in that Code. The procedure is simple and easily administered. Nor is there anything in that special procedure encroaching upon the right to a jury trial, secured by the Federal Constitution, in suits at common law where the value in controversy exceeds twenty dollars. If it be assumed—a point which is not necessary to decide—that that part of the Constitution is applicable and in force in Porto Rico, the proceeding is not a suit at common law, but simply a method of ascertaining damages in a special proceeding in which property has been wrongfully seized.

Nor would the general provisions of the Revised Statutes (sec. 648), providing for a jury trial as to issues of fact in Circuit Courts, except in cases of admiralty and equity jurisdiction, prevent the enforcement of the express provisions of the Porto Rican Code as to assessment for damages for wrongful attachment.

Section 8 of the Foraker act, as we have seen, continues in force the laws and ordinances of Porto Rico, except as modified by military orders and decrees in force, so far as the same are not inconsistent or in conflict with the statutory laws of the United States, which by sec. 14 of the act, when not locally inapplicable, with certain exceptions, are declared to be in force and effect in

Porto Rico as in the United States. The general provisions as to jury trials in civil causes in Circuit Courts of the United States are not inconsistent with the enforcement of a special statutory proceeding as to the assessment of damages in attachment proceedings, as to which the United States has no special statutory procedure, and enforces in that respect the requirements of the local law.

If we are right in holding that the Porto Rican law and practice as to attachments and the recovery of damages in respect thereto are controlling in a Federal court in that territory, and a common law action for a wrongful and malicious attachment was unknown to the Porto Rican procedure, the court had no jurisdiction of the action. The record shows that practically no exception was taken in the record and proceedings in the trial court, but it is familiar law that this court will of its own motion inquire into the jurisdiction which it has and as well that of the court below, without any special exception being taken. If, as illustrated in the brief for counsel for the plaintiff in error, a Circuit Court of the United States should undertake to entertain a bankruptcy proceeding or an admiralty cause, its proceedings would be void for want of jurisdiction. So, in the present case, there being no such common law action enforcible under the Porto Rican procedure, a court of that district would have no jurisdiction to entertain the suit. Where the jurisdiction fails the objection can be raised in this court; if not by the parties, then by the court itself. Parker v. Ormsby (141 U. S. 81); Mansfield Railway Co. etc. v. Swan (111 U. S. 379); Thompson v. Railway Co. (6 Wall. 134).

We, therefore, reach the conclusion that the United States District Court had no jurisdiction of this action, and consequently the proceedings had therein were null and void.

Judgment reversed.

Mr. Justice WHITE (dissenting)—As it is conceded that the question upon which the judgment is now reversed was not saved in the court below, I am constrained to dissent. In my opinion the error, if any, was a mere question of mode of procedure, involving no want of jurisdiction *ratione materiae*, even concedng that the presence of a question of such a character would authorize this court to reverse—in the absence of any exception in the court below—or any reference to the question in that court.

Mr. Justice MCKENNA concurs in this dissent.

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The irrigation of private lands is held, in Nash v. Clark (Utah) 1 L. R. A. (N. S.) 208, to be a public purpose, for which land may be taken by condemnation.

Early Iowa Lawyers and Judges.

AN ADDRESS BY HON. JOHN F. DILLON BEFORE THE IOWA SOCIETY AT THE WALDORF-ASTORIA BANQUET.

On Saturday evening, April 28, the Iowa Society of New York gave a grand banquet at the Waldorf-Astoria Hotel, New York. At this gathering several former and present Iowans made addresses. The address of greatest historical value was that by Hon. John F. Dillon, for so many years a resident of Davenport. Judge Dillon gave reminiscences of some early Iowa lawyers and four Iowa judges. The Albany Law Journal considers itself fortunate in obtaining the full text of Judge Dillon's address, as follows:

Mr. President and Gentlemen: To no sentiment on the list would I rather speak than this. Interesting as the theme is, time must be of the essence of my response, for there are many persons present whom you wish to hear. The best speech tonight will be the shortest.

Congress created the Territory of Iowa in June, 1838, and Iowa was admitted into the Union in 1846. The high order of ability of the territorial and early bar of Iowa has often been remarked and justly. Nothing is more ephemeral than professional reputations in the legal world. Keats said, with a note of disappointment and sadness, that his epitaph should be: "Here lies one whose name was writ in water." This is applicable to most lawyers. The lawyer walks along the sandy shore of the everflowing stream of litigation, but his footprints are not enduring, for they are effaced by the winds and waves and by the footsteps of those that follow after him. With this fate the lawyer must be content.

The early bar of Iowa is adorned with such names, yet uneffaced, as Grimes, Starr, Rorer, Mason, Hall, Darwin, Browning of Burlington, Hastings, Lowe, Woodward, Richman of Muscatine, Folsom, Byington, Carleton of Iowa City, Platt Smith, Hempstead, Bissell, Samuels of Dubuque, Smithe of Marion, Knapp, Wright of Keosaqua, Love, Beck, D. F. Miller of Lee county, Grant, Cook, Mitchell of Davenport, etc.

Able as the bar of Iowa has ever been and now is, it is not too much to say that in point of equipment and ability the earliest lawyers were the peers of any that have come after them. And it is perhaps true that the percentage of able men at the territorial bar was greater than it is at the bar of to-day. This much as to early Iowa lawyers.

And now a few words concerning four Iowa judges:

FOUR IOWA JUDGES.

Outstanding and pre-eminent among the judges of Iowa are four names—Mason, the first and only

chief justice of the territory; Wright, chief justice of the State's Supreme Court from 1855 to 1870, and Judges Miller and Love of the Federal Court.

Concerning each of these suffer me a few words, and chiefly of Judge Mason, whose name is already fading from the general memory of the bar and people.

CHARLES MASON (1804-1882).

Was born in the State of New York, 1804, was a classmate at West Point with Jefferson Davis and Robert E. Lee and was graduated at the head of his class in 1829. He read law in New York city and was for a time a writer on the Evening Post. In 1837 he was appointed United States attorney for Wisconsin territory and located at Burlington, then in that territory. In 1838 was appointed by Van Buren chief justice of the Supreme Court of Iowa territory, and held that place until Iowa was admitted as a State in 1846. He was commissioned in 1848 to revise laws of Iowa, of which the Iowa Code, 1851, was the outcome. After holding various public places of importance he died near Burlington in 1882 at the age of 78.

Two things concerning Judge Mason are well worth recalling, one relating to his judical career, and the other to his personal character.

It fell to his lot to decide, in 1839, a cause of the greatest public and historical importance. It is the first reported case in the first volume (Morris) of Iowa Reports—the case entitled, "Ralph (a colored man) on Habeas Corpus."

To those familiar with the history of Iowa since 1856, it will perhaps be a surprise to learn that the first territorial legislature in 1838 passed an act prohibiting any free negro from settling in Iowa unless he first gave bond for $500 for good behavior and that he would not become a public charge. If he failed to give bond he should be arrested and hired out to the highest bidder for cash for six months. Whoever harbored or employed a colored man who had not given bond was subject to a fine of $100, and any slaveholder might come to Iowa and by Iowa officers arrest and take back a slave who had escaped from bondage. Against this law only three votes were recorded. Even James W. Grimes, afterwards the first Republican Governor of Iowa, did not vote against it.

Ralph was a slave in Missouri. He made a contract with his owner, Montgomery, to buy his freedom for $550, with permission to go to the Dubuque lead mines in Iowa to earn the money. Ralph, though he is said to have worked industriously, had not been able to save enough to pay Montgomery. Two men in Dubuque volunteered to deliver Ralph to Montgomery in Missouri for $100. Montgomery accepted the order. Governor Gue in his excellent history of Iowa, says Ralph was kidnaped, but this seems to be a mistake. While at work in the mines Ralph was arrested as a fugitive slave under a warrant issued by a justice of the peace pursuant to the statute just mentioned, and the sheriff of Dubuque county delivered him into the custody of Montgomery's agents for the purpose of being transported to Missouri. He was handcuffed and taken to Bellevue to be sent by steamboat to Missouri. Alexander Butterworth, a farmer, seeing the arrest, procured from Justice Wilson a writ of habeas corpus, and Ralph was returned to Dubuque. The case was of such importance that it was transferred to the Supreme Court of the territory and came up before Judges Mason, Wilson and Williams. It involved, you will perceive, the great question which many years afterwards arose in the famous Dred-Scott case, viz.: the constitutionality and effect of the Missouri Compromise act of 1820 forbidding slavery north of 36 degrees 30 minutes. It involved the momentous question fought out in the civil war, viz.: whether slavery was local and freedom national, or the reverse.

The court, Chief Justice Mason giving the opinion, decided these three propositions:

1. Where a slave goes with the consent of his master to become a permanent resident of a free State or territory, he can not be regarded as a fugitive slave.

2. The act of 1820, for the admission of Missouri into the Union, which prohibits slavery north of 36 degrees 30 minutes was not intended merely as a naked declaration, requiring further legislative action and to carry it into effect, but must be regarded as an entire and final prohibition of slavery north of that line.

3. The master, who subsequently to this act, permits his slave to become a permanent resident here, cannot afterwards exercise any acts of ownership over him within this territory.

The result was that Ralph was declared to be a free man and he was taken from the custody of his captors and set at liberty by these three Democratic judges.

The case is interesting moreover, in a wider view. The court applied to the infant territory of Iowa the principles of English freedom first established by Lord Mansfield in Somersett's case, decided some 60 years before. Somersett, a Jamaica slave, was brought by his master to England, intending soon to return with him to Jamaica. Somersett claimed his freedom in England and was brought before Lord Mansfield on habeas corpus and discharged from custody of his master, Lord Mansfield making the grand declaration that "The air of England has long been too pure for a slave, and every man is free who breathes it. Whoever comes into England is entitled to the protection of English law, whatever may be the color of his skin."

True it is that the Dred-Scott decision afterwards

rendered was in direct conflict with Judge Mason's decision on Ralph's case. But in the civil war a higher body than either of those courts, namely, the American people in their primary and sovereign capacity, overruled the Dred-Scott decision and re-established the doctrines of the Iowa court in Ralph's case.

With Ralph's case the published records of Iowa jurisprudence begin, and those records, so long as they last, will honorably perpetuate the names of Chief Justice Mason and his associates.

By that decision Iowa became the first free child of the "Missouri Compromise." And when, in contemplating the State of Iowa to-day in its maturity, we look back through the intervening years to the early days when Ralph's case was decided, we are for many reasons filled with pride, and especially because our whole State has ever justified the inscription written by Governor Eastman and which is borne upon the stone which the State contributed to the Washington monument: "Iowa, Her Affections, Like the Rivers of Her Borders, Flow to a Perpetual Union."

Out of the Louisiana purchase have been carved fourteen states with 14,000,000 of free people. In 1838 there were only 22,000 inhabitants in Iowa—now the home of 2,000,000 or more. This amazing growth and development is due to the fact that the hardy and industrious people who settled this region carried with them their laws and notions of freedom; their reverence for law; the deep-rooted conviction that liberty and justice are one and inseparable; and in the forty-five States of this Republic the strongest bond of union is the system of laws and jurisprudence, uniform and homogenous, which prevails from ocean to ocean, from the lakes to the gulf, whereby individual freedom and equality before the law, the sacredness of contracts as the means, and property as the reward of universal compensation in the affairs of life, are inviolable and secure.

One word concerning Judge Mason as a man. When holding court in Iowa City he saw a spirited caricature called the "Removal of the Capital." He inquired who did it. Informed that it was a widow's son, he sent for him and though not then rich in this world's goods, he gave the young man the money needful to procure an art education in New York and Europe. This man became distinguished in his profession; he repaid, unsought by Judge Mason, the money he had received from him and afterwards painted his portrait, which, among the portraits of other officials of Iowa, also painted by him, adorn its capital, and he also became Judge Mason's biographer. This artist George H. Yewell, still lives and is, I hope, present to-night.

In the All-seeing eye such acts as this of Judge Mason, of which history keeps no record, is perhaps more precious than any public service which he ever rendered. "And lo! Ben Adhem's name led all the rest."

"On such acts, the gods themselves throw incense."

"Inasmuch," said the Divine Master, "as ye did this unto one of the least of these, ye did it unto me."

And now a brief word as to Iowa judges who came after Judge Mason.

WRIGHT, GEORGE G. (1820-1896). 1855-1870.

Chief Justice Supreme Court of Iowa.

The verdict of the bar at the time was and probably would be now that all in all Judge Wright has had no equal among the State's chief justices or judges. He knew by heart every decision of the court, and every important act of the legislature, and thus kept the line of judicial decisions steady and consistent. He presided with great dignity. He had remarkable executive ability, and unwearied diligence. Every case was examined, discussed and decided in conference.

His judicial temperament was as perfect as that of any judge I ever knew. Absolute impartiality and strong sense were his characteristics. All this combined with adequate learning and wide experience to make him a model judge. It is because he united these qualities and these merits that the bar and people of Iowa hold him and his memory in honor; they think of him first of all as a judge, rather than as a senator or legislator.

JUDGE LOVE.

I now turn for a moment to Iowa federal judges.

Love, James M. (1820-1891), 1835 United States district judge. Appointed by Pierce. Died in office in 1891.

Of all the men with whom I have been brought in contact Judge Love realizes my highest ideal of a gentleman. He was the best *nisi prius* judge I have ever seen. He would have been eminent on the appellate bench. Thoroughly grounded in the fundamental principles of law, he was not dependent upon the mere cases to guide him in his judgments. He carried the torch of justice lighted from on high, and it led him safely through the mazes of the most intricate litigation. A strong man like Judge Love may do this with (as in his case) the best results. His judicial instinct was almost unerring. He struck at once for the heart and justice of the matter, and rarely missed his aim. He was a man of wide reading and liberal culture and his latest work, revised during his last illness, "A Lawyer's Commentary Upon Shylock v. Antonio," is perhaps the most instructive view of the legal aspects of that celebrated case that was ever written (25 American Law Review, Dec., 1891, p. 899). He left a mem-

ory deep-rooted in the regard and esteem of his fellow citizens and of the entire bar—the most priceless reward any man can have—the most precious legacy any man can leave to his country, his family, and his friends.

MR. JUSTICE MILLER.

Lastly I mention, all too briefly, Mr. Justice Samuel F. Miller (1816-1880).

He was appointed by President Lincoln in 1862, died in office in 1890. He dealt with the great and novel questions that grew out of the civil war. He towers in mountainous magnitude against the judicial horizon. He was indeed a great judge. If, during his 28 years of service, he had been the chief justice of the supreme court, I verily believe his fame would have been second only to that of Marshall, "the great chief justice." Justice Miller, by his great labors connected his name with the judicial and constitutional history of his country, upon which he left a permanent impress, and his fame is lasting and secure.

Justice Miller belongs not alone to Iowa. He is one of the most illustrious judges this country has produced. We all saluted him as master. Transferring Lamb's description of Thomas Coventry, an old Bencher of the Inner Temple, as one "whose person was quadrate, his step massy and elephantine, his face square as the lion's, his gait peremptory and path-keeping, indivertible from its way as a moving column," we have a striking picture of Mr. Justice Miller, if we add that under this severe exterior he had a heart as soft and tender, as true and loyal as a woman's. I have often thought that his strong features, massive frame and majestic port, duly put in marble or bronze, might stand for a Roman Caesar in Rome's best days, and that Rome so distinguished for its legal genius never produced a jurisconsult more worthy of perpetual honor than Mr. Justice Miller. Let us not rest satisfied until Iowa shall erect in her capital city at Des Moines a fitting monument to commemorate the unsullied life (living and dying a poor man), the public services and just fame of her most eminent judicial magistrate. Will not the Iowa Society of New York set the movement on foot to procure the necessary legislative sanction and let the bar and citizens of Iowa and of the country do the rest?

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What is Criminally "Obscene?"*

Read at the International Medical Congress held at Lisbon, Portugal, April, 1906.

The English Parliament, the Congress of the United States, and all the States of the American Union, have penalized "lewd, indecent and obscene" literature and art. All this legislation, and the judicial interpretation of it, proceeds upon the assumption (false assumption, as I believe) that such words as "obscene" stand for real qualities of literature, such as are sense perceived, and, therefore, permit of exact general definition or tests, such as are capable of universal application, producing absolute uniformity of result, no matter by whom the definition or test is applied to every book of questionable "purity."

Under these laws, as administered in England and America, every medical book which treats of sex—and many which do not—are declared criminal, and their circulation even among professionals is a matter of tolerance, in spite of the law, and not a matter of right under the law. The infamy of such a statute has induced some American courts, under the guise of "interpretation," to amend the statute judicially, so as to exempt some medical book, otherwise "obscene," from being criminal if circulated only among some professional men. What the judicial legislation will be, must always depend in each case upon the court.

If an accurately definable character of the word "obscene" is not implied in all our laws penalizing the "indecent," then they do not prescribe a uniform rule of conduct, and are therefore beyond the power of any English or American legislature to enact. That such is the assumption, is further evidenced by the fact that no legislative definition or test is furnished, and courts assert that none is necessary, since these are matters of common knowledge.

That assertion, I believe, is based upon lack of psychologic intelligence, and it is here intended to outline an argument to demonstrate its falsity. Be it remembered, that this is a question in the science of psychology. It is not a question of ethics, nor law, nor legislative expediency, but ever and always a matter of science, which must underlie all these. If my contention is correct, then present obscenity laws are a nullity, for want of a definition of the crime, and for the non-existence of that which the statute seeks to punish. I will prove that "obscenity" is ever and always the exclusive property and contribution of the reading mind.

Nothing will be herein contended for, which will preclude the passage of some other laws designed to accomplish some of the same ends, which some people think justify our present laws against "impure" literature. To illustrate: Except when done by parents, guardians, et al., it could be made a crime to sell, or transmit, etc., to any person under the age of consent, any book containing such word as "sex," or any picture of the sexual mechanism. In such a law, all the conditions of the crime would easily be prescribed with that exactness, which leaves no room for such objections as I am now going to make against the existing statutes.

Such a law would not, and should not, assume to

decide, nor authorize a jury to decide, what is good or bad literature. It would simply assume the incompetence of children to judge for themselves what information they desired, and at the same time accord that rightful liberty to adults.

In 1661, the learned Sir Matthew Hale, "a person than whom no one was more backward to condemn a witch without full evidence," used this language: "That there are such angels (as witches), it is without question." Then he made a convincing argument from Holy Writ, and added: "It is also confirmed to us by daily experience of the power and energy of these evil spirits in witches and by them." (Annals of Witchcraft, by Drake, preface XI.)

With the same assurance, and no greater ignorance of science—as we hope to show—our courts now affirm that the differential tests of obscenity "are matters which fall within the range of ordinary intelligence," and, therefore, "everyone who uses the mails . . . must take notice of what, in this enlightened age, is meant by 'decency, purity and chastity in social life,' and what must be deemed obscene, lewd and lascivious."

This appeal, to the consensus of opinion in "this enlightened age," has been made in support of every superstition that has ever paralyzed the human intellect. It would be more reassuring if judges had given, or would give, us a test of obscenity, in terms of the objective, sense-perceived qualities of literature, *by which test alone* we could unerringly and with unavoidable uniformity, draw the same, exact, unshifting line of partition between what is obscene and what is pure in literature, no matter who applies the test. Until they furnish such a test to us, their dogmatic assurance that "this enlightened age" possessed such undisclosed knowledge of standards, is not very satisfactory. Without such a test, there is no uniform law to control our conduct, or our courts or juries.

Whenever one affirms that obscenity is not a quality of literature or art, but solely a contribution of the unhealthy reading mind, and, therefore, opposed the obscenity prosecutions, or questioned any other sex-superstition, he is promptly cowed into silence by an avalanche of vituperation, such as "impure," "immoral," "smut-dealer," "moral cancer-planter." Such epithets may be very satisfying to undeveloped minds, but they will not commend themselves very highly to any person wishing to enlighten his intellect upon the real question at issue. Again we say: This is a matter of science, which requires fact and argument, and cannot be disposed of by question-begging villification.

The courts are more refined, though not more argumentative nor convincing, in their manner of denouncing dissenters. The judicial formula is this: "When such matters are said to be only impure to the over-prudish, it but illustrates how familiarity with obscenity blunts the sensibilities, depraves good taste, and perverts the judgment." Again we ask for fact and argument, not question-begging dogmatism. The statute furnishes no standard of sex sensitiveness, nor is it possible for any one to prescribe a general rule of judgment, by which to determine where is the beginning of the criminal "blunted sensibilities," or the limit of "good taste," and the law-making power could not confer this legislative authority upon a judge, though in these cases all courts are unconsciously presuming to exercise it.

Furthermore, it is not clear that "blunted sensibilities" are not a good condition to be encouraged in the matter of sex. Who would be harmed, if all men ceased to believe in the "obscene," and acquired such "blunted sensibilities" that they could discuss matters of sex, as we now discuss matters of liver or digestion,—with an absolute freedom from all lascivious feelings? Why is not that condition preferable to the diseased sex-sensitiveness so often publicly lauded, when parading in the verbiage of "purity?" If preferable, and so-called "obscene" literature will help to bring about such "blunted sensibilities," would it not be better to encourage such publication? It requires argument and fact, rather than "virtuous" platitudes, to determine which is the more healthy-minded attitude toward these subjects. I plead for scientific research, not the brute force of blind dogmatism and cruel authority.

Assuming its existence as a quality of literature, the judicial "tests" for detecting the presence of obscenity, manifest such extraordinary ignorance of sexual psychology, that no man who is accused can reasonably expect to escape conviction by denying the character of his book. The unfailing verdict of "guilty" is not, as some flatter themselves, due to the wisdom of the prosecutors, but is wholly due to the judicial ignorance of science, and to the undefined and indefinable nature of the offense. Let us reason together about this.

If, in spite of the argument by vituperation, a person refuses, "with humble prostration of intellect," to submit to the demands of moral snobbery, he is cast from the temple of "good society" into jail. Then the benighted act as though by their question-begging epithets or jail commitment, they had solved the scientific problem which is involved. Let us examine if it is not as true of obscenity as of every witch that it exists only in the minds of those who believe in it.

My contention is this: "Obscenity" is not an objective fact, not a sense-perceived quality of literature or art, but is only distinguishable by the likeness of particular emotions associated with an infinite variety of mental images. Therefore, obscenity is only a quality or contribution of the viewing mind which, being associated with some ideas, sug-

gested by a book or picture, is therefore *read into it.* This may be proven in many ways, and among these, by the resultant fact that "obscenity" never has been, nor can be, described in terms of any universally applicable test of the sense-perceived qualities of a book or picture, but ever and always it must be described as subjective, that is, in terms of the author's suspected motive, or in terms of dreaded emotions of speculative existence in the mind of some supposititious reader.

With some knowledge of the psychologic processes involved in acquiring a general conception, it is easy to see how courts, as well as the more ignorant populace, quite naturally fell into the error of supposing that the "obscene" was a quality of literature, and not—as in fact it is—only a contribution of the reading mind. By critical analysis, we can exhibit separately the constituent elements of other conceptions, as well as of our general idea of the "obscene." By a comparison, we will discover that their common element of unification may be either subjective or objective. Furthermore, it will appear that in the general idea, symbolized by the word "obscene," there is only a subjective element of unification, which is common to all obscenity, and that herein it differs from most general terms. In the failure to recognize this fundamental unlikeness between different kinds of general ideas, we will discover the source of the popular error, that "obscenity" is a definite and definable, objective quality of literature and art.

A general idea (conception) is technically defined as "the cognition of a universal, as distinguished from the particulars which it unifies." Let us fix the meaning of this more clearly and firmly in our minds by an illustration.

A particular triangle may be right-angled, equilateral or irregular, and in the varieties of these kinds of triangles, there are an infinite number of shapes, varying according to the infinite differences in the length of their boundary lines, meeting in an infinite number of different angles.

What is the operation when we classify all this infinite variety of figures under the single generalization "triangles?" Simply this: In antithesis to those qualties in which triangles may be unlike, we contrast the qualities which are common to all triangles, and as to which all must be alike.

These elements of identity, common to an infinite variety of triangles, constitute the very essence and conclusive tests by which we determine whether or not a given figure is to be classified as a triangle. Some of these essential, constituent, unifying elements of every triangle are now matters of common knowledge, while others become known only as we develop in the science of mathematics. A few of these essentials may be re-stated. A plain triangle must enclose a space with three straight lines; the sum of the interior angles formed by the meeting of these lines always equals two right angles; as one side of a plain triangle is to another, so is the sine of the angle opposite to the former to the sine of the angle opposite to the latter.

These, and half a dozen other mathematical properties belong to every particular triangle; and these characteristics, always alike in all triangles, are abstracted from all the infinite different shapes in which particular triangles appear; and these essential and constant qualities, thus abstracted, are generalized as one universal conception, which we symbolize by the word "triangle."

Here it is important to bear in mind that these universal, constitutent, unifying elements, common to all triangles, are neither contributions, nor creations, of the human mind. They are the relations of the separate parts of every triangle to its other parts, and to the whole, and these uniform relations inhere in the very nature of things, and are of the very essence of the thing we call a "triangle."

As the force of gravity existed before humans had any knowledge of the law of its operation, so the unifying elements of all triangles exist in the nature of things, prior to and independent of our knowledge of them. It is because these unifying elements, which we thus generalize under the word "triangle," are facts of objective nature, existing wholly outside of ourselves, and independent of us, or of our knowledge of their existence, that the word "triangle" is accurately definable.

We will now analyze that other general term, "obscene," reducing it to its constituent, unchanging elements, and we will see that, in the nature of things, it must remain incapable of accurate, uniform definition, because, unlike the case of a triangle, the universal element in all that is "obscene" has no existence in the nature of things objective. It will then appear that, for the want of observing this difference between these two classes of general terms, judges and the mob alike, assumed that the "obscene," like the "triangle," must have an existence outside their own emotions, and, consequently, they were compelled to indulge in that mystifying verbiage, which the courts miscall "tests" of "obscenity."

First of all, we must discover what is the universal constituent, unifying element common to all obscenity. Let us begin with a little introspection, and the phenomena of our every-day life. We readily discover that what we deemed "indecent" at the age of sixteen, was not so considered at the age of five, and probably is viewed in still another aspect at the age of forty.

We look about us, and learn that an adolescent maid has her modesty shocked by that which will make no unpleasant impression upon her after maternity, and by that which would never shock a physician. We know, also, that many scenes are shocking to us if viewed in company, and not in the least

offensive when privately viewed; and that, among different persons there is no uniformity in the added conditions which change such scenes to shocking ones.

We see the plain countryman shocked by the decollete gowns of our well-bred society women; and she, in turn, would be shocked into insensibility if, especially in the presence of strange men, she were to view some pastoral scenes which make no shocking impressions upon her rustic critic. The peasant woman is most shocked by the "indecency" of the society woman's bare neck and shoulders, and the society woman is shocked most by the peasant woman's exhibition of bare feet and ankles, at least if they were brought into the city woman's parlor. We see that women, when ailment suggests its propriety, quite readily undergo an unlimited examination by a male physician, while with the sexes reversed, much greater difficulty would be experienced in securing submission. This is not because men are *more* modest than women, but because other social conditions and education have made them *differently* modest.

It would seem to follow that the universal qualities which we collect under the general term "obscene," as its constituent, unifying elements are not inherent in the nature and relations of things viewed, as is the case with the triangle. Taking this as our cue, we may follow the lead into the realm of history, ethnology, sexual psychology and jurisprudence. By illustrative facts, drawn from each of these sources, it can be shown to a demonstration that the word "obscene" has not one single universal, constituent element in objective nature.

Not even the sexual element is common to all modesty, shame or indecency. A study of ethnology and psychology shows that emotions of disgust, and the concept of indecency or obscenity, are often associated with phenomena having no natural connection with sex, and often in many people are not at all aroused by any phase of healthy sexual manifestation; and in still others it is aroused by some sensual associations and not by others; and these, again, vary with the individual according to his age, education and the degree of his sexual hyperaestheticism.

Everywhere we find those who are abnormally sex-sensitive and who, on that account, have sensual thoughts and feelings aroused by innumerable images, which would not thus affect the more healthy. These diseased ones soon develop very many unusual associations with, and stimulants for, their sex-thought. If they do not consider this a lamentable condition, they are apt to become boastful of their sensualism. If, on the other hand, they esteem lascivious thoughts and images as a mark of depravity, they seek to conceal their own shame by denouncing all those things which stimulate sensuality in themselves, and they naturally and erroneously believe that it must have the same effect upon all others. It is essential to their purpose of self-protection, that they make others believe that the foulness is in the offending book or picture, and not in their own thought. As a consequence, comes that persistence of reiteration, from which has developed the "obscene" superstition, and a rejection—even by Christians—of those scientific truths in the Bible, to the effect that "unto the pure all things are pure," etc. We need to get back to these, and reassert the old truth, that all genuine prudery is prurient.

The influence of education in shaping our notions of modesty is quite as apparent as is that of sexual hyperaesthesia. We see it, not only in the different effect produced upon different minds by the same stimulants, but also by the different effect produced upon the same person by different objects bearing precisely the same relation to the individual. When an object, even unrelated to sex, has acquired a sexual association in our minds, its sight will suggest the affiliated idea, and will fail to produce a like sensual thought in the minds of those not obsessed by the same association.

Thus, books on sexual psychology tell us of men who are so "pure" that they have their modesty shocked by seeing a woman's shoe displayed in a shop window; others have their modesty offended by hearing married people speak of retiring for the night; some have their modesty shocked by seeing in the store windows a dummy wearing a corset; some are shocked by seeing underwear, or hearing it spoken of otherwise than as "unmentionables;" still others cannot bear the mention of "legs," and even speak of the "limbs" of a piano. Surely, we have all met those who are afflicted in some of these ways and others who are not.

Since the statutes do not define "obscene," no one accused under them has the least protection against a judge or jury afflicted with such diseased sex-sensitiveness, or against more healthy ones who, for want of information about sexual psychology, blindly accept the vehement dictates of the sexually hyperaesthetic as standards of purity. But whether a judge or a juror belongs to either of these classes, or rejects their dictum as to what is pure in literature, in any and every such event, he is not enforcing the letter of a general law, but enacting and enforcing a particular *ex post facto law* then exacted by him solely for the particular defendant on trial. What that law shall be in any case depends on the experiences, education and the degree of sex-sensitiveness of the court, and not upon any statutory specification of what is criminal.

Among the more normal persons, we see the same difference as to what is offensive to their modesty, depending altogether upon whether or not they are accustomed to the particular thing. That which, through frequent repetition, has become commonplace no longer shocks us, but that which, though it has precisely the same relation to us or to the sen-

sual, is still unusual, or is seen in an unusual setting, does shock us.

Some who are passive if you speak of a cow, are yet shocked if you call a bull by name. In the human species, you may properly use the terms "men" and "women," as differentiating between the sexes, but if you call a female dog by name, you give offense to many. So, likewise, you may speak of a mare to those who would take flight if you called the male horse by name. With like unreason, you may speak of an ox or a capon to everybody, of a gelding to very many, but of a eunuch only to comparatively few, without giving offense. No one thinks that nudity is immodest, either in nature or in art, except the nudity of the human animal; and a few are not opposed to human nudity in art, but find it immodest in nature.

The Agricultural Department of the United States distributes information on the best methods for breeding domestic animals, and sends those to jail who advocate the higher stirpiculture, for the sake of a better humanity.

Likewise, Prof. Andrew D. White tells us that: "At a time when eminent prelates of the Older Church were eulogizing debauched princes like Louis XV., and using the unspeakably obscene casuistry of the Jesuit Sanchez, in the education of the priesthood as to the relations of men and women, the modesty of the church authorities was so shocked by Linnaeus' proofs of a sexual system in plants, that for many years his writings were prohibited in the Papal States, and in various parts of Europe where clerical authority was strong enough to resist the new scientific current."

Now, education has so reversed public sentiment, that one may write with impunity about the sexuality of plants, which was formerly denounced as a "Satanic abyss;" but men have been, and would be, sent to jail for circulating in the English language the books of Sanchez and others like him.

It thus appears that the only unifying element generalized in the word "obscene," (that is, the only thing common to every conception of obscenity and indecency), is subjective, is an affiliated emotion of disapproval. This emotion under varying circumstances of temperament and education in different persons, and in the same person in different stages of development, is aroused by entirely different stimuli, and so has become associated with an infinite variety of ever-changing objectives, with not even one common characteristic in objective nature, that is in literature or art.

This, then, is a demonstration that obscenity exists only in the minds and emotions of those who believe in it, and is not a quality of a book or picture. We must next outline the legal consequences of this fact of science. Since, then, the general conception "obscene" is devoid of every objective element of unification; and since the subjective element, the associated emotion, is indefinable from its very nature, and inconstant as to the character of the stimulus capable of arousing it, and variable and immeasurable as to its relative degrees of intensity, it follows that the "obscene" is incapable of accurate definition or general test, adequate to securing uniformity of result, in its application by every person, to each book of doubtful "purity."

Since few men have identical experiences, and fewer still evolve to an agreement in their ideational and emotional associations, it must follow that practically none have the same standards for judging the "obscene," even when their conclusions agree. The word "obscene," like such words as delicate, ugly, lovable, hateful, etc., is an abstraction not based upon a reasoned, nor sense-perceived, likeness between objectives, but the selection or classification under it is made, on the basis of similarity in the emotions aroused, by an infinite variety of images; and every classification thus made, in turn, depends in each person upon his prior experience, education and the degree of neuro-sexual or psycho-sexual health. Because it is a matter wholly of emotions, it has come to be that "men think they know because they feel, and are firmly convinced because strongly agitated."

Being so essentially and inextricably involved with human emotions, no man can frame such a definition of the word "obscene" either in terms of the qualities of a book, nor such that, *by it alone*, any judgment whatever is possible, much less is it possible that by any such alleged "test" every other man must reach the same conclusion about the obscenity of every conceivable book. Therefore, the so-called judicial "tests" of obscenity are not standards of judgment, but, on the contrary, by every such "test" the rule of decision is itself uncertain, and in terms invokes the varying experiences of the testators within the foggy realm of problematical speculation about psychic tendencies, without the help of which the "test" itself is meaningless and useless. It follows that to each person the "test," which supposedly is a general standard of judgment, unavoidably becomes a personal and particular standard, differing in all persons according to those varying experiences which they read into the judicial "test." It is this which makes uncertain, and, therefore, all the more objectionable, all the present laws against obscenity.

This general argument can be given particular verification by a study of history, ethnology, general and sexual psychology, and judicial decisions, until we have produced demonstration amounting to a mathematical certainty that neither nature, common knowledge, science, nor the statute, has furnished, or can furnish, any tests by which to measure relative degrees of obscenity, or to fix the freezing point

of modesty, as with a thermometer we measure relative heat and cold, or by chemical tests we determine the presence of arsenic.

If, then, neither nature, common knowledge, nor the statute, furnish so exact a definition of the "obscene" that, no matter by whom applied, it must uniformly and unerringly fix the same line of partition from that which is not "obscene," and if scientific research has furnished no tests by which, without speculative uncertainty, we may with mathematical accuracy classify every book or picture which, to the less enlightened, would seem to be on the borderland of doubtful "purity," then, it must follow that no general rule exists applicable to all cases, and by which we can or do judge what is a violation of the statutory prohibition.

The so-called "tests," by which the courts direct juries to determine whether books belong to the "indecent and obscene," are a terrible indictment of the legislative and judicial intelligence, which could create and punish a mental crime, and determine guilt under it by such absurd "tests." Bereft of the magical, mystifying phrasing of moral sentimentalizing, the guilt of this psychological crime is always literally determined by a constructive (never actual), psychological (never material or demonstrable), potential and speculative (never a realized) injury, predicated upon the jury's guess, as to the problematical "immoral tendency" (not indicating the rules of which school of religious or scientific morality are to be applied) of an unpopular idea, upon a mere hypothetical (never a real) person. No! This is not a witticism, but a literal verity, a saddening, lamentable, appalling indictment of our criminal code as judicially interpreted.

Under a law of such vagueness and mystical uncertainty, be it said to our everlasting disgrace, several thousand persons in America have already been deprived of liberty and property; unnumbered others have been cowed into silence, who should have been encouraged to speak; and almost a score have been driven to suicide.

If, then, it is true that a book or a picture can only be classified as to its obscenity, not primarily according to the substance of that which it reveals, but according to the emotions thereby aroused, then, three conclusions irresistibly follow: First, there is no general test of obscenity capable of producing accuracy and uniformity of result in classifying books; second, for the want of such test, there never can be a conviction according to the letter of a uniform law, but every verdict expresses only a legislative discretion, wrongfully exercised after the act to be punished, and according to the peculiar and personal experiences of each judge or juror; and it is, therefore, but the enactment of a particular law, for the particular defendant then being tried, and applying to no one else. From these two follows the third, namely: That no man, by reading the statute, can tell whether a particular book is criminal or not, because the criminality does not depend upon the statute, but upon the incompetent jurors' speculative opinion about the psychological tendency of the book.

It is inevitable, from such an indefinable statute, that the determination of what is "obscene" should become a matter of juridical arbitrariness, even though a clouded vision—as to the difference between judicial interpretation and judicial legislation—should induce all courts to deny the fact. However, some judges, with that *naivete* which evidences their consciouslessness of what they do, quite freely admit that it is not a matter of law, but a matter of discretion, which determines the character of a book, and, therefore, the "guilt" of its vendor.

One judge, after fumbling with those definitions of "obscene"—which define nothing—continued his instructions to the jury as follows: "These are as precise definitions as I can give. The case is one which addresses itself largely to your good judgment, common sense," etc. (38 Fed. R. 733.)

If "obscenity" means definable qualities of a book, how can guilt under this criminal law be made a matter of "good judgment," or a juror's conception of what is "common sense" upon the subject? The "good judgment" is for the legislature to exercise in passing the law, not for the jurors in determining its meaning, or its application.

In other cases juries are instructed that: "If, in their judgment, the book was fit and proper for publication, and such as should go into their families, and be handed to their sons and daughters, and placed in boarding-schools, for the beneficial information of the young and others, then, it was their duty to acquit the defendant. . . . The jury were instructed that it did not matter whether the things published in the book were true and in conformity with nature or not." (Com. v. Landis, Phila.)

What is here plainly expressed is in every other case necessarily implied; because the statute has not created any general rule by which we can determine what is against the law. Every conviction is securable only by an exercise on the part of the jury of created any general rule by which we can determine even of truth, and that discretion is personal to the jurors, and always this particular law of the jury is enacted *ex post facto* at the trial of the accused, and not before, and is not, and cannot be, binding upon any other jurors. Since the legislative power cannot be delegated to a jury, and cannot be exercised *ex post facto*, even by the legislature itself, it follows that our present laws against "obscenity" must be a nullity, and will yet be so declared, when this argument, properly elaborated, shall be presented to an intelligent court.

Nearly two hundred years ago Montesquieu, in viewing the tyrannies about him, wrote this: "In

despotic governments there are no laws, the judge himself is his own rule. . . . In republics, the very nature of the constitution requires the judges to follow the letter of the law. Otherwise the law might be explained to the prejudice of every citizen in cases where their honor, property or life is concerned." (Spirit of Laws, p. 81.)

Within the domain of literature, we have unintentionally, through psychologic ignorance, re-established that irresponsible, arbitrary absolutism of the judiciary, which it took many ages of painful struggle to abolish. Shall it remain and be extended, or will we throttle this new despotism? Of jurisprudence it is said: "Its value depends on a fixed and uniform rule of action." From what has preceded, it follows that the statutes here in question are uncertain beyond all possibility of being made uniform guides for our conduct. As has been shown, this uncertainty never arises from any doubt as to the contents of the book to be judged, but the uncertainty always arises solely from the indefinable nature of that which the statute attempts to penalize.

It follows that convictions can only be had as antipathy or affection, caprice or whim, on the part of the jurors, dictates the result of their deliberations. For each, the foundation of his judgment of guilt in his personal experiences, necessarily differing from the experience of other jurors, who, therefore, have other standards of judgment. It is no credit to the intelligence of the bar, that these matters have never been argued to any court. When adequately presented to an intelligent judge, with psychologic insight and an open mind, all present obscenity legislation will disappear. To that end, such a judge will do his plain duty by applying the old legal maxim: "Where the law is uncertain, there is no law."

The short space remaining will be devoted to one of the many illustrations, which in this class of cases exhibit the colossal stupidity of judicial tribunals in "this enlightened age." The courts of America, with great uniformity, have followed the early English decisions in their attempts to define obscenity. Here is the judicial formula: "The statute uses the word 'lewd,' which means, having a tendency to excite lustful thoughts. . . . The test of obscenity is this—whether the tendency of the matter, charged as obscene, is to deprave and corrupt *those whose minds are open to such immoral influences* and into whose hands a publication of this sort *might* fall."

Here, we can take space to analyze but one of the numerous absurdities involved in this "test of obscenity." We will limit ourselves to the phrase "those whose minds are open to such immoral influences." This, of course, includes those who, through long sex-suppression or disease, are afflicted with the most acute sexual-hyperaesthesia.

Kraft-Ebing, among many biographies of sexual psychopaths, gives one from which I will only quote a single paragraph. The patient says: "The thought of slavery had something exciting in it for me, and alike whether from the standpoint of master or servant. That one man could possess, sell or whip another, caused me intense excitement; and in reading 'Uncle Tom's Cabin,' (which I read at about the beginning of puberty) I had an —r—ct—n." (Psychopathia Sexualis, p. 105.)

The explanation is not difficult. The stirring scenes depicted in "Uncle Tom's Cabin" produced a very intense general excitement, which, by its irritation of the—possibly abnormally sensitive sex nerve-centers, produced sexual excitement.

A jury of experts, knowing this and kindred facts, and applying the test of obscenity and lewdness prescribed in practically all the English and American decisions, must conclude that "Uncle Tom's Cabin" is an obscene and lewd book, within the statute. Only a jury very ignorant of the effect of such a book on "those whose minds are open to such immoral influences," could render a verdict of "not guilty," if trying a person charged with the "indecent crime" of sending "Uncle Tom's Cabin" through the mails.

But the courts who promulgated such stupidity as a "test" of obscenity, tell us that this is "within the range of ordinary intelligence." Yes, so *extraordinary* that my vocabulary is inadequate for the occasion, and, therefore, I close.

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New Books and New Editions.

A full list of McClure-Phillips spring publications is as follows: "Lady Betty Across the Water," an Anglo-American story by C. N. and A. M. Williamson, authors of "My Friend the Chauffeur," "The Lightning Conductor," etc.; "In Out Town," sketches from the editorial sanctum of a small western community, by William Allen White; "Red Saunder's Pets and Other Critters," humerous animal tales by Henry Wallace Phillips, author of "Red Saunders;" "The Four Million," stories of New York, humorous and otherwise, by O. Henry, author of "Cabbages and Kings;" Vrouw Grobelaar and Her Leading Cases," powerful tales of the Veldt of Perceval Gibbon; "More Stories of Married Life," by Mary Stewart Cutting; "Pigs is Pigs," a farcical novelette by Ellis Parker Butler; "The Far Country," a book of poems, by Florence Wilkinson; "The Life of a Star," stage reminiscences by Clara Morris; "Enemies of the Republic," investigations in State government corruption, by Lincoln Steffens; "Wayside Talks," by Charles Wagner; "The Cost of Competition," by Sidney A. Reeve; "Foster's Complete Bridge," by R. F. Foster; and "The Meaning

of Good," by G. Lowes Dickinson, author of "Letters from a Chinese Official."

John Lane Company announce for early publication—in addition to "The Patriot's Mistake," a volume of reminescences of Charles Stewart Parnell, the biography of the pianist, "Theodor Leschetizky," and the "Country Cottage," of which mention has already been made—a novel by Fiona Macleod (William Sharp), entitled "The Mountain Lovers;" a pocket edition in two volumes of Trollope's "Orley Farm;" "The Book of the Winter Garden," by D. S. Fish; the seventh edition of "The Coming of Love," a dramatic poem by Theodore Watts-Dunton, and new editions of "A Shropshire Lad," by A. E. Housman; "The Napoleon of Notting Hill," by Gilbert K. Chesterton, author of "Heretics," the late Dr. S. R. Maitland's essays on "The Reformation in England" and "The Life of St. Mary Magdalen," translated from the Italian by Valentina Hawtrey.

"John Fiske," by Thomas Sergeant Perry, is the latest addition to the Beacon Biographies, published by Small, Maynard & Company. This is the first biography of John Fiske, who was, perhaps, the most widely known of American scholars. All those who have read John Fiske's works on History and Philosophy or heard him lecture will wish to read this fascinating account of his life and work and the manifestation of his genius, written by his almost life-long friend, Thomas Sergeant Perry.

The Baker & Taylor Company announces that "Pictorial Composition and the Critical Judgment of Pictures," by Henry R. Poore, is about to go to press for the fifth time. The book has created endless discussion among artists, but has done more than any other work to classify and crystallize men's views on the make-up of pictures. The demand in England has also been good, an extraordinary recognition of an American art book.

The first volume on Burma, in the extended "Report on Colonial Administration in the Far East," by Alleyne Ireland, F. R. G. S., which is to be issued by Small, Maynard & Company in twelve volumes, is announced for publication this spring. This comprehensive work on Colonial Administration is receiving the warm approbation and encouragement of the political, economic and educational world.

The high standard of the North American Review is well maintained by the May number of that periodical. Baron Speck von Sternburg, Imperial German Ambassador to the United States, deprecates "The Phantom Peril of German Emigration and South American Settlements." Luigi Luzzatti, Finance Minister in the Italian Government, describes the organization and the purposes of "The International Institute of Agriculture." Henry James gives some of his impressions of the city of Washington. Frank W. Blackmar, professor of Economics in the University of Kansas, recounts the history of "The Mastery of the Desert." An American citizen, who resides in Turkey, and for obvious reasons signs himself merely "Americus," sets forth "Some Phases of the Issues Between the United States and Turkey." George Stewart Brown argues that "Municipal Ownership of Public Utilities" is advisable for political as well as for economic reasons. H. G. Davis, chairman of the Permanent Pan-American Railway Committee, and lately candidate for the vice-presidency, presents "The Business Side of the Pan-American Railway." Walter L. Fleming, professor of History in West Virginia University, explains the origin and influence of the expectations still entertained by many a Southern negro that he is to receive from the government "Forty Acres and a Mule." Hannis Taylor vindicates the Spanish Treaty Claims Commission in the action it has taken on the claims which have been presented to it for adjudication. Louise Collier Willcox reviews "Some Recent Poetry."

The June issue of the International Studio contains an article on the work of the American pictorial photographers who form the society known as the Photo-Secession. A dozen of the best photographs by the foremost workers are reproduced in illustration. Leila Mechlin contributes an article on the Philadelphia Water Color Exhibition. The recent exhibition of the Minnesota State Art Society is described by Emma E. Beard. T. Martin Wood writes of "The Art of the Late Arthur Melville," with illustrations, two of them being reproductions in color of water color paintings. The work of Agustin Querol, the Spanish sculptor, is discussed in an illustrated article by Charles Rudy. Two color reproductions accompany an appreciation of the "Drawings of L. Pasternak," by P. Ettinger. In a preliminary notice of the Royal Academy Exhibition are presented eight full page reproductions of some of the leading paintings and sculpture. Fifteen detailed plans for a Week-End Bungalow, submitted in the Studio Competition, are represented in full page reproductions. The Studio Talk is rich in material from San Francisco, Philadelphia and European centers. The inserts besides those mentioned above include a tinted reproduction of the photograph by Eduard J. Steichen, entitled "The Big White Cloud," a colored reproduction of Parker Mann's "Morning Glow," reproductions of etchings by Emil Zoir and Frank Brangwyn and of a painting by Keller-Reutlingen of a street scene in Munich.

In the biographical and critical study of Alphonse Daudet, by Robert Harborough Sherard, which is being published by John Lane Company, is found the following description of the novelist's methods of working, as they were related by himself to the writer. "I write slowly, very slowly, and revise and

revise. I am never satisfied with my work. My novels I always write myself. I never could dictate a novel. As to my plays, I used formerly to dictate them. I had a certain talent in my legs, just as Napoleon had a certain genius in the legs of his soldiers. My books go through many processes. To begin with I fill my note books. Each note as it is used is scratched out in blue or red pencil. From these written notes and the tablets of my memory—the *deltoi* of my memory—I write out in copybooks the first copy of my novel. I write this first copy on alternate pages of my copybooks and leave the opposite sheet blank. When the book is finished in its rough state I rewrite it page by page on the blank sheets. The page on the right is the amended copy of the page on the left. Then my wife looks at this second copy and suggests to me what improvements might be made. I note these down. Then I rewrite the whole book again with the joy of a school boy who feels that a wearisome task is ended. Sometimes I work for eighteen hours a day, and day after day. At other times I pass months without touching a pen."

John Lane Company are issuing from the Bodley Head a new edition of Owen Seaman's book of humorous verse, "In Cap and Bells." Mr. Seaman, it will be recalled, has succeeded to the position of editor of London's famous comic weekly, Punch, left vacant by the resignation of Sir Francis C. Burnand. The retiring editor is the author of more than 120 plays, chiefly burlesques and light comedies, and has written also a number of books. Before he assumed the editorship of Punch a quarter of a century ago, he had been intimately associated with that periodical for twenty years. It is not expected that the shift of editors will produce any change in the character of Punch itself, known to all the English speaking world. Now that the admirable parodist, Owen Seaman, takes the head of the table, Punch will be more Punch than ever.

Nora Hopper, whose death was recently reported from London, wrote several volumes of verse and prose strongly imbued with the Celtic sentiment. She was not an Irishwoman, however, and had never lived in Ireland. She was the daughter of an English army officer and in 1901 married Wilfrid Hugh Chesson. Her volume of poems called "Under Quicken Boughs," and another volume, "Ballads in Prose," are published from the Bodley Head by John Lane Company.

The ghost stories which Vernon Lee tells in the volume being issued from the Bodley Head by John Lane Company, under the title "Hauntings," are not such as would be called genuine ghost stories in the scientific sense. They tell of no hauntings such as could be contributed by the Society for Psychical Research, of no spectres that could be caught in definite places and made to dictate judicial evidence. "My ghosts," writes Vernon Lee in her preface, "are what you would call spurious ghosts (according to me the only genuine ones), of whom I can only affirm one thing: that they haunted certain brains, and have haunted among others, my own and my friends."

There is in every life, says the author of "The Secret Life," published by John Lane Company, some Secret Garden, where one unbinds the girdle of conventions and breathes to a sympathetic listener opinions one would repudiate upon the housetops. Lacking a kindred soul, one naturally resorts to the blank pages of a diary. In accordance with his theory, the present book, written in the form of a diary, contains a number of short, pithy essays, dealing with subjects as varying and interesting as "The Modern Woman and Marriage," "The Ideal Husband," "Amateur Saints," "The Fourth Dimension," "The Beauty of Cruelty," "Are American Parents Selfish?" "The Pleasures of Pessimism," "The Value of a Soul," etc., etc.

Jeremiah Curtin, the only authorized translator of Henryk Sienkiewicz, the great Polish novelist, is at present engaged in writing an important work, to be called "The Mongols, a History." Mr. Curtin spent three months among the Buriats, the only tribe of Mongols who have retained the horse sacrifice and preserved the splendid creation myths of their race. Mr. Curtin is the author of "Creation Myths of Primitive America," "Myths and Folklore of Ireland," "Myths and Folk Tales of the Russians," "Western Slavs and Magyars," and other authoritative volumes of a similar description. Polish is said to be but one of seventy foreign languages with which he is familiar. Mr. Curtin has received from Henryk Sienkiewicz the exclusive right of translating all that author's works into English.

The May Arena is very strong in its fine literary and artistic features. "What Our Universities are Doing for American Literature" is a deeply philosophical and searchingly thoughtful paper by Edwin Davies Schoonmaker, the talented author of "The Saxons." The well-known and popular author, George Wharton James, contributes a magnificently illustrated paper on Charles H. Grant, the famous marine painter, and his work. This contribution carries a number of excellently executed half-tone reproductions of Mr. Grant's paintings. General Simon Bolivar, the liberator of northern South America, is the subject of another illustrated paper in this issue, prepared by the eminent student of South American history, Professor Frederic M. Noa. Among subjects of deep interest to thoughtful students of American civic life are the following: "Criminal Wealth versus Common Honesty," by Albert Brandt; "The Railways of Colorado," by Hon.

J. Warner Mills; "The British Labor Party: Its Aims and Aspirations," by William Diack; "The Value of an Immigrant," by Hon. Robert Baker; "Where the People Really Rule," a story of Oregon under Direct Legislation, and "Why We Favor Municipal Ownership," two extended editorials by Mr. Flower.

Mr. Ernest Ingersoll's new book, "The Life of Animals," is to be illustrated with colored plates, more than a hundred unpublished photographs from life, and many original drawings. It is the life of the animals to which the author devotes himself—the part they daily play in the world around them, not their position in a museum or in a scheme of classification. The whole is treated in the light of the latest facts. The Macmillan Company promises Mr. Ingersoll's book for issue before June.

Professor H. H. Horne, of Dartmouth, author of "The Philosophy of Education," has written a new book which the Macmillan Company will publish shortly, under the title of "The Psychological Principles of Education." This volume is described as the most comprehensive attempt yet made to apply the results of modern psychology to the practice of teaching. In it the author reduces to practice some of the theories contained in "The Philosophy of Education."

"Centralization and the Law," is the title of a book containing a series of exceedingly informing and timely lectures, delivered by members of the faculty of the Boston University Law School as part of the plan of legal extension on foot there, published by Little, Brown & Co., Boston. Dean Melville N. Bigelow has supplied the introduction to the volume. These lectures hold that the law to-day is lagging dangerously, that the greatest issues must soon be decided, and that lawyers must be educated to participate in the solution—something that lawyers can only do intelligently if they have a good grasp of the forces at work in our society, as well as a knowledge of the history and forms of the law itself.

"A Digest of the Law of Trade Marks," by Norman F. Hesseltine, of Boston bar, announced for immediate publication by Little, Brown & Co., Boston, is not a mere digest of cases, but a compact statement of the entire law on the subject of Trademarks and Unfair Trade, carefully worked out and analyzed, each rule or statement of law being supported by a digest of all the cases from which it has been formulated. All federal and patent office decisions are brought down to February, 1906, and the book is therefore the latest, as well as the most available, on the subject. The Trademark Law of 1905, with the rules of the Patent Office, etc., are added in an appendix, while there is a complete table of cases.

A new edition, revised to January, 1906, of "The Incorporation and Organization of Corporations," by Thomas Gold Frost, of the New York bar, has just been published by Little, Brown & Co., Boston. All the changes made during 1905 in the corporation laws in all the States and Territories, together with the latest decisions, are included in this new edition.

The Living Age for May 19th contains an article by Henry W. Lucy, the long-time parliamentary observer and reporter, upon the New House for the Commons, in which is embodied a great deal of political information entertainingly conveyed.

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Among the Late Decisions.

A foreign corporation doing business in the state is held, in Boyer v. Northern P. R. Co. (Idaho), 70 L. R. A. 691, not to acquire a fixed residence in the state for the purpose of suing and being sued by designating an agent upon whom process may be served as required by the provisions of a state statute. A note to this case reviews the other authorities on locality of jurisdiction of state court over foreign corporations.

The right of a nonresident to sue a foreign corporation doing business in the state and having agents located therein is sustained in Reeves v. Southern R. Co. (Ga.), 70 L. R. A. 513, provided the enforcement of the cause of action would not be contrary to the laws and policy of the state.

A corporation is held, in The Jennie Clarkson Home for Children v. Missouri, K. & T. R. Co. (N. Y.), 70 L. R. A. 787, not to be able to escape liability to the owner of its registered bonds for their value, where it has cancelled the registration, and made them payable to bearer contrary to its agreement, by the fact that its transfer agent was deceived by the forgeries of the agent of the owner, where such agent, in dealing with the bonds, was acting entirely outside of the scope of his authority.

Requiring a foreign corporation to pay a license fee as a condition precedent to the right to do business in the state, or subject itself to penalties supposed to be prescribed by a statute, is held, in C. & J. Michel Brewing Co. v. State (S. D.) 70 L. R. A. 911, not to be such compulsion as will entitle it to recover the amounts paid in case the statute is adjudged to be unconstitutional.

The owner of property abutting on a street the fee of which is in the public, at a point which is depressed below the grade of other property through which the street runs, is held, in Sauer v. New York (N. Y.) 70 L. R. A. 717, to have no right to enjoin the use of a viaduct erected by the municipality under legislative authority, to facilitate travel be-

tween the more elevated parts of the street, although it is 50 feet above the street level in front of his property and ingress to and egress from his property, together with the free and uninterrupted circulation of light and air, have been impaired, and the value of his property decreased.

A magistrate invested with general jurisdiction over the subject-matter of an alleged offense is held in Bush v. Buckley (Me.) 70 L. R. A. 464, not to be liable to a civil action for erroneously deciding, in good faith that he has jurisdiction over a particular offense of which complaint is made to him, and issuing a warrant for the arrest of accused, although the ordinance under which the proceeding was taken proves to be without effect.

A modern apartment house is held, in Kitching v. Brown (N. Y.) 70 L. R. A. 742, not to be within a covenant against the erection upon certain premises of a tenement house, which was made at a time when that term referred to the habitations of the very poor, and was associated in the contract with other things that were obviously noxious, noisome, or deleterious.

The reclamation of wet or marsh lands of the state for agricultural purposes by drainage is held, in Sisson v. Buena Vista County (Iowa) 70 L. R. A. 440, to be a public use, for which the power of eminent domain may be exercised.

The mere creation and distribution of power for manufacturing enterprises is held, in Brown v. Gerald (Me.) 70 L. R. A. 472, not to be a public use which will justify an exercise of the power of eminent domain.

The acquisition of a mere private way is held, in Arnsperger v. Crawford (Md.) 70 L. R. A. 497, not to be a purpose for which the right to exercise the power of eminent domain may be delegated, although the way is intended to connect a private estate with the public highway.

One who, through an agent, conducts a loan office, receiving for loans rates of interest which are so extortionate as to shock the moral sense and be against the public policy of the state, is held, in Woodson v. Hopkins (Miss.) 70 L. R. A. 645, not to be entitled to the aid of a court of equity to compel the agent to pay over money received in the business, or to obtain possession of the books, memoranda, and other property pertaining thereto.

Where one in possession of property under a contract to purchase has taken an assignment from the owner of a right of action for the conversion of gravel thereon, it is held, in Rogers v. Portland & B. Street Railway (Me.), 70 L. R. A. 574, that he may be estopped by his own acts from prosecuting the action where the action is to be for his own benefit because of an agreement that any recovery shall be applied in reduction of his indebtedness to the true owner.

That one cannot be a fugitive from justice, subject to interstate rendition, unless he was in the state from which the demand comes at the time the crime is charged to have been committed, is decided in Farrell v. Hawley (Conn.) 70 L. R. A. 686.

A merchant maintaining a store and storehouse on opposite sides of a river, at a point where a ferry is maintained by another person, is held, in Peru v. Barrett (Me.) 70 L. R. A. 567, to infringe the ferry license by maintaining row boats, of which he accords his customers free use in the transaction of business with him, where his customers consist of the public generally, and he receives what is a full equivalent for ferriage in the profits of the sales, and his acts clearly diminish the profits of the ferry.

Knowledge of a policeman concerning a defect in a street is held, in Cleveland v. Payne (Ohio) 70 L. R. A. 841, not to be such notice to the municipality as to make it responsible for damages resulting from the defect, in the absence of any statute or ordinance charging policemen with the duty of repairing or looking after the streets.

Public use of a strip of land as a highway for a period of seven years before the rights of a homestead entry attach to it is held, in Okanogan County v. Cheetham (Wash.), 70 L. R. A. 1027, to be a sufficient acceptance of the benefit of a Federal statute providing that the right of way for the construction of highways over public lands not reserved for public use is hereby granted.

An injunction against drawing natural gas from a natural reservoir utilized for supplying the inhabitants of a municipal corporation, merely for the purpose of wasting it and injuring those who were utilizing it, is held, in Louisville Gas Co. v. Kentucky Heating Co. (Ky.), 70 L. R. A. 558, to be properly granted.

The construction, operation, and maintenance of an oil refinery for the purpose of receiving, manufacturing, storing, and handling crude and refined oil and its by-products, and the marketing of the same, are held, in State ex rel. Coleman v. Kelly (Kan.) 70 L. R. A. 450, to constitute a "work of internal improvement."

The right of a foreign corporation which has complied with the laws of the state governing such corporations, and which has been regularly and continuously doing business in the state during the entire period required to bar an action, and during all that time has had an agent resident therein upon whom process could be served, to avail itself of the state statute of limitations, is sustained in Colonial

& U. S. Mortg. Co. v. Northwest Thresher Co. (N. D.) 70 L. R. A. 814.

A state statute forbidding the bringing of an action for the price of liquors sold in another state, to be resold in violation of the laws of the state where the statute was passed, is held, in Corbin v. Houlehan (Me.) 70 L. R. A. 568, not to violate the commerce clause of the Federal Constitution.

The act of the leasor of property as a site for a saloon business in preventing the acquisition of a necessary license by protesting against its issuance as owner of other property in the block is held, in Kellogg v. Lowe (Wash.) 70 L. R. A. 510, not to effect an eviction.

The fact that a tenant is summarily ejected from a building for non-payment of rent is held, in Bergh v. Herring-Hall-Marvin Safe Co. (C. C. A., 2d C.), 70 L. R. A. 756, not to deprive him of his right to remove his trade fixtures.

When the facts upon which probable cause for an arrest depend are in dispute, it is held, in Stoecker v. Nathanson (Neb.) 70 L. R. A. 667, that the question of the existence of such cause must be left to the jury for determination under proper instructions by the court.

A claim for money advanced upon the credit of the vessel at the request of the owner, who is without funds in a foreign port, to enable the vessel to load and continue her voyage, is held, in Chamberlain Transp. Co. v. Ashland Nat. Bank (C. C. A. 7th C.) 70 L. R. A. 353, to be a maritime lien. An elaborate note to this case reviews all the other authorities on what contracts will support a maritime lien.

A street car company is held, in Crawford v. United Railways & E. Co. (Md.) 70 L. R. A. 489, to be liable for injury to an employee caused by a defect in a car, due to the fact that, according to custom, it was, after inspection, left for several hours of the night in a public street, without any rule or regulation intended to guard it from negligent or wanton injury.

A car inspector and switchman are held, in Lellis v. Michigan C. R. Co. (Mich.) 70 L. R. A. 598, to be fellow servants, so that a railroad company is not liable for injury to a switchman by lumber loaded in a dangerous manner on a flat car, which is permitted to go forward after being received from a connecting road through the negligence of a competent inspector furnished by it.

A railroad employee is held, in Milbourne v. Arnold Electric P. Station Co. (Mich.), 70 L. R. A. 600, not to assume, as matter of law, the risk of the impact of the train on which he is riding with cars on a spur track upon which cars from his train are to be placed, where more than the spare room has been used by the superintendent for storage of other cars without notice to those in charge of the train upon which such employee is riding.

An employee of a railroad company whose duty it is to operate a steam pump, and who is furnished with a railroad tricycle to procure the necessary fuel along the road, who has departed from his employment by going beyond the point where he expected to secure fuel on an errand of his own, is held, in Barmore v. Vicksburg S. & P. R. Co. (Miss.) 70 L. R. A. 627, to resume the employment when he begins to return to that point, so as to render the master liable for his negligent act in running down a pedestrian between the point where he turned about and the point where the fuel was to be obtained.

Negligence or error of judgment, of a competent foreman having authority to hire and discharge the men, in refusing to permit the selection, from a store of rope, of a piece sufficient for the use intended, and insisting upon the use of a piece which proves to be insufficient, is held, in Vogel v. American Bridge Co. (N. Y.) 70 L. R. A. 725, not to render the master liable for a resulting injury to a workman, since the risk of injury from such fault is assumed by the men as incidental to the execution of the work in its details.

The act of a railroad employee, under direction of his foreman, who has been sent by the general superintendent to erect a snow fence upon private property of an abutting owner, in assaulting an employee of the latter who has been sent by the owner of the property to remonstrate against the erection of the fence, is held, in Waaler v. Great Northern R. Co. (S. D.) 70 L. R. A. 731, not to be within the scope of his employment.

The act of a servant of a telephone company, charged with the duty of setting poles and stringing wires over a certain route, in causing the arrest of a landowner along the route to get him out of the way in order that poles may be erected and wires strung over his property against his will, is held, in Jackson v. American Telep. & Teleg. Co. (N. C.) 70 L. R. A. 738, to render the telephone company liable.

The owner of a house, who engages a person who has occasionally worked for him to cut a tree into grate wood and pile it in a dark cellar under direction of the butler, is held, in Eastland v. Clarke (N. Y.) 70 L. R. A. 751, not to be relieved from liability for injuries caused by his falling into a hole in the cellar bottom which was left uncovered by the butler several months previously, on the ground that he and the butler are fellow servants.

A master who sends an employee to repair switches on elevators, which requires him to work inside the

wells in the path of cars at a time when they are in operation, is held, in Western Electric Co. v. Hanselmann (C. C. A. 2d C.) 70 L. R. A. 765, to be liable for injuries to him, due to failure to use the necessary means to give him timely warning of the approach of cars.

A mason contractor is held, in Mooney v. Beattie (Mass.) 70 L. R. A. 831, to owe no duty to his employees to inspect stone received from the quarry to ascertain if it is free from explosives used to blast it from the quarry bed. The duty of a master to inspect materials upon which a servant is to work is the subject of a note to this case.

The liability of a master for the wanton act of his servant in killing a person when acting without the scope of his employment, under a statute giving a right of action against railroad companies for death resulting from the negligence of the company or the unfitness or carelessness of its servants, is denied in Bowen v. Illinois C. R. Co. (C. C. A. 8th C.) 70 L. R. A. 915.

That a railroad company sending employees out in severely cold weather to clean the track in open country, remote from habitations, is under no duty to provide them with food and shelter, or carry to his home an employee whose feet have been frozen, is declared in King v. Interstate Consolidated Street R. Co. (R. I.), 70 L. R. A. 924. A note to this case collates the other authorities on duty of master to furnish protection to servant whose work requires exposure to cold.

The act of a baggage master who has been placed in charge of the waiting room of the railroad company, in assisting in the wrongful arrest of a passenger waiting at the station, is held, in Texas Midland R. Co. v. Dean (Tex.) 70 L. R. A. 943, to render the company liable, although the arrest was at the instance of the city authorities, and not on behalf of the railroad company.

The care required, on the part of a master, in providing and adopting methods for thawing dynamite, is held, in Bertha Zinc Co. v. Martin's Admr. (Va.) 70 L. R. A. 999, to be no more than ordinary care, which is such care as reasonable and prudent men exercise under like circumstances.

The filing of a chattel mortgage for record is held, in Greer v. Newland (Kan.), 70 L. R. A. 554, not to import constructive notice to a commission merchant to whom the mortgaged property is sent for sale and who sells and pays the proceeds, less his commission, to his consignor.

An unrecorded release of a portion of property covered by a mortgage, by the holder of the mortgagor, is held in Gibson v. Thomas (N. Y.) 70 L. R. A. 768, not to be binding upon a subsequent assignee of the mortgage without notice, although the tract released has been sold to and gone into the possession of a railroad company, which has occupied it as a right of way.

Power to require an existing railroad track to be conformed to the grade of a street which crosses it is held, in Houston & T. C. R. Co. v. Dallas (Tex.) 70 L. R. A. 850, to be conferred upon a municipal corporation by a provision in its charter empowering it to require railroad companies of all kinds to construct at their own expense such crossings and other things as the city council may deem necessary. The power of a municipality to compel change of grade of railway in street is the subject of a note to this case.

The right of a municipal corporation to deprive the owner of a dead animal of his property right in the carcass by giving to public contractors the exclusive right to dispose of it prior to its having become an actual nuisance is denied in Richmond v. Caruthers (Va.) 70 L. R. A. 1005.

One who leaves exposed and unguarded on his premises a large quantity of dynamite, knowing that children are in the habit of resorting there to play, is held, in Mattson v. Minnesota & N. W. R. Co. (Minn.) 70 L. R. A. 503, to be liable for the death of a child resulting from the explosion of a stick of dynamite which the children had procured from the premises.

A municipal ordiance fixing the hours of labor and the minimum rate of wages to be paid to laborers upon a public contract is held in *Re* Broad (Wash.) 70 L. R. A. 1011, not to interfere with the constitutional guaranty of liberty and property.

The rigght to erect stock pens, or other improvements, which in themselves would constitute a nuisance to occupants of neighboring property, is held in Missouri, K. & T. R. Co. v. Mott (Tex.) 70 L. R. A. 579, not to be conferred by a statute giving railroad companies the right to erect on their rights of way all necessary and convenient buildings and stations, fixtures, and machinery, for the accommodation and use of passengers, freight, etc., or which may be necessary for the operation of its railway.

One practising mental healing in good faith and without positive intent to defraud, under the belief that he has the power to effect cures in that manner, is held, in Post v. United States (C. C. A. 5th C.) 70 L. R. A. 989, not to be subject to conviction for a fraudulent use of the United States mail in sending circulars and letters through it, and receiving remittances from patrons in response thereto.

A homestead entry of land, recognized by the Land Office, is held, in Reservation of State Bank v. Holst (S. D.) 70 L. R. A. 799, to entitle the entry man

to possession, and give him a right to all that may be growing on the land, as against one who had acquired prior peaceable possession of the property with an intention of making a homestead entry of it. A note to this case collates the other authorities on right of one who buys, or makes lawful entry on, public land, to crops and improvements placed thereon by another.

Sale of the growing timber by a homestead settler on public land, before he has received his patent, for the purpose of carrying out in good faith the object of the acquisition and enjoyment of the homestead, is held, in King-Ryder Lumber Co. v. Scott (Ark.), 70 L. A. R. 873, not to be illegal, even though a benefit should incidentally result to him from the sale.

The right of one in possession of public land under a homestead entry to lease the timber standing thereon for securing the turpentine is sustained in Orrell v. Bay Mfg. Co. (Miss.) 70 L. R. A. 881.

One riding in a buggy upon the seat with the driver of the horse is held, in Colorado & Southern R. Co. v. Thomas (Colo.) 70 L. R. A. 681, to be bound to exercise care, upon approaching a railroad crossing, to determine whether or not a train is approaching; and it is held that no recovery can be had for his death resulting from a collision with a his death resulting from a collision with a train, train, where, knowing that a train is approaching, he joins with the driver in testing the danger of attempting to cross the track in front of the train.

A railroad company which constructs a siding or switch from its road to a manufactory at the expense and over the land of the latter, solely for its benefit, and under a written agreement silent as to the length of time it is to remain, is held, in Rodeter v. Pittsburg, Ohio Valley & Cincinnati R. Co. (Ohio) 70 L. R. A. 844, to have no right to maintain the siding against the objection of the owner of the manufactory.

An invitation to use a railroad right of way as a footpath is held, in Williamson v. Southern R. Co. (Va.), 70 L. R. A. 1007, not to arise from merely permitting such use, where a sign is conspicuously posted warning persons not to do so.

Injury to property near a railroad by the jarring of the earth, by the casting thereon of soot and cinders, and the emission of smoke, physically injuring it, is held in Smith v. St. Paul, M. & M. R. Co. (Wash.), 70 L. R. A. 1018, to be within the protection of a constitutional provision requiring compensation for property damaged for public use.

A manufacturer who sells goods by sample is held, in Nixa Canning Co. v. Lehmann-Higginson Grocer Co. (Kan.), 70 L. R. A. 653, impliedly to warrant that they are free from any latent defect that could not be discovered upon ordinary examination of the sample. Warranty on sale of goods by sample is the subject of a note to this case.

An irrevocable trust is held, in Re Totten (N. Y.) 70 L. R. A. 711, not to be established by the deposit of one's own funds in his own name in a savings bank in trust for another, where the depositor retains possession of the deposit book and control of the deposit, does not notify the beneficiary of the act, and deals with the account as his own, withdrawing it entirely in his life-time.

The validity of a statute to correct a defect in a previous statute for the construction of a drainage ditch, which was invalid for failure to provide for notice to owners of land not touched by the improvement, but which might be assessed for the cost, was upheld in Ross v. Board of Supervisors (Iowa) 1 L. R. A. (N. S.) 431, in the absence of any constitutional prohibition of retroactive laws.

The intentional omission of prohibitory liquor laws from the list of laws the taking effect of which the Constitution permits to depend upon the vote of the people is held, in Fouts v. Hood River (Or.) 1 L. R. A. (N. S.) 483, not to prevent the legislature from passing a statute providing the machinery by which license laws may be suspended by vote of the people.

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Judge Houlihan's Philosophy.

Ninth beatitude—"Blessed is he who expects nothing, for he shall not be disappointed."

The man who sleeps (?) in church
When the collection box goes the rounds
Will get left in the lurch
When Gabriel's trumpet sounds.

The same man who sleeps in church at the approach of the poor-box falls asleep at the approach of a conductor on a street car.

"There is rest for the weary," said his honor, when a vagrant received a six-months' sentence.

"Let the blessed sun shine in," remarked the photographer who was doing an illicit Sunday business.

Whin a feller is in love an' out iv work his love lamp has a cracked chimney.

After 30 there is a red lantern on love's track, an' at 35 it is thrack thirteen (13) an' a washout.

Whin a feller gets clear gone on a girl there are tumbler pigeons in his mental belfry.

"None but the wicked down the road must go" don't apply to insurance people.

Grover Cleveland is an exclusive aristocrat. His picture is on the $1,000 bill, so he won't come to act with common people.

JOSEPH M. SULLIVAN, LL.B.
Of the Suffolk (Mass.) Bar.